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TRANSCRIPT OF RECORD

Pet. 166 85796 U.S.S.C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 455

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, ET AL., PETITIONERS,

vs.

STANDARD SURETY & CASUALTY CO. OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1937.

CERTIORARI GRANTED NOVEMBER 8, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3231.

FREDERICK S. DEITRICK, Receiver, ET AL.,

APPELLANTS,

v.

STANDARD SURETY & CASUALTY COMPANY,

APPELLEE.

CONSOLIDATED APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENTS AND DECREES (McLELLAN, J.) JUNE 18, 1936.

TRANSCRIPT OF RECORD.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
GOODWIN, PROCTER & HOAR,
for Appellants.

FREDERIC H. CHASE,
RAYMOND P. BALDWIN,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3231.

FREDERICK S. DEITRICK, RECEIVER, ET AL.,
APPELLANTS,
v.
STANDARD SURETY & CASUALTY COMPANY,
APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 5225, LAW DOCKET.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),
v.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 5316, LAW DOCKET.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),
v.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 5317, Law Docket.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE.

No. 3849, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3850, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3851, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

No. 3852, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.

Seven Cases Consolidated for Appeal.

No. 5225 Law Docket.

Frederick S. Deitrick, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver), Plaintiff,

v.

Standard Surety & Casualty Company of New York et Trustee, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organized by law with an usual place of business in Boston, Suffolk County, Massachusetts, to the value of sixty thousand dollars, and summon the said defendant (if it may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the fourth Tuesday of June next: then and there, in our said court, to answer unto John B. Cunningham, as he is receiver of Boston Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff.

To the damage of the said plaintiff (as he says) the sum of sixty thousand dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of sixty thousand dollars aforesaid, which can be come at to be attached; but has entrusted to, and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law with an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the ninth

day of June, in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk,*
by EDITH G. ROLLINS, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, June 10, 1932.

Pursuant hereunto I have this day, at 1 o'clock and 58 minutes, P. M., attached a chip as the property. Thereafter I summoned the trustee, The First National Bank of Boston, to appear as within directed by giving in hand to V. T. Hanson, Assistant Cashier, at Milk Street, Boston, in said district, a true and attested copy of the within writ. Thereafter on the same day at 2 o'clock and 25 minutes P. M. I summoned the within named defendant, Standard Surety and Casualty Company, of New York, to appear as within directed, by giving in hand to Merton L. Brown, Commissioner of Insurance for the Commonwealth of Massachusetts, two true and attested copies of the within writ, together with $2.00, his legal fee for acceptance of service thereon.

WILLIAM J. KEVILLE, *United States Marshal,*
by JOSEPH A. GATELY, *Deputy.*

The writ in this cause was duly entered at the June Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, June 28, 1932, the following Declaration was filed:

DECLARATION.

[Filed June 28, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States, that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, ex-

ecuted under seal and delivered to the Continental National Bank of Boston, now known as Boston-Continental National Bank, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Continental National Bank of Boston the sum of forty thousand dollars ($40,000) in the event that four notes of ten thousand dollars ($10,000) each signed by Westchester Discount Corporation were not paid upon the due dates as set forth in said bond, the last due date being April 20, 1931; that some time prior to April 20, 1931, said bond was extended to June 20, 1931, by a written instrument called endorsement, copy whereof is hereto annexed marked "B"; that some time prior to June 20, 1931 said bond was extended to December 20, 1931 by a written instrument called endorsement, copy whereof is hereto annexed marked "C"; that the condition of said bond as extended as aforesaid has been broken in that Westchester Discount Corporation, the principal named therein, has not paid the notes described in said bond according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said notes; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the plaintiff on account of the default of said Westchester Discount Corporation are in excess of forty thousand dollars ($40,000).

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond with interest from December 20, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION
by Joseph Stone, Treas. [SEAL]
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

No. 1038

GENERAL POWER OF ATTORNEY

Know all Men by these Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make, constitute and appoint Percy G. Cliff or R. L. Carven its true and lawful attorney-in-fact with full power and authority at - - - - to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation, and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any of the By-laws of the Company, and to any Resolution adopted by its Board of Directors.

In Witness Whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By: John R. English, Vice-President.

ATTEST: Edward J. Halligan, Assistant Secretary

State of New York
City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English to me known, who, being by me duly sworn, did depose and say: That he resides in the State of New Jersey; that he is Vice-President of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority. F. H. Colquhoun, Notary Public

B.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to

an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

At the same term, to wit, June 28, 1932, the following Answer of Trustee was filed:

TRUSTEE'S ANSWER.

[Filed June 28, 1932.]

And now comes The First National Bank of Boston, summoned as trustee in the above-entitled cause; and appears by C. S. Wiggin, one of its assistant cashiers, who for answer says that at the time of the service of the plaintiff's writ on the bank it had an account standing in the name of Standard Surety & Casualty Company of New York on which there was a balance then due of $320.21 and that it had no other goods, effects or credits of the said defendant in its possession or control.

This answer is made under the penalties of perjury.

C. S. WIGGIN,
Assistant Cashier.

We appear for The First National Bank of Boston.

BURNHAM, BINGHAM, GOULD & MURPHY,

Attorneys.

One Federal Street, Boston, Mass.

Also at the same term, to wit, July 19, 1932, the following Defendant's Answer in Abatement was filed:

DEFENDANT'S ANSWER IN ABATEMENT.

[Filed July 19, 1932.]

Now comes the defendant in the above-entitled cause, and appearing specially for this purpose and no other, and without submitting itself to the jurisdiction of this Honorable Court, pleads in abatement of the plaintiff's writ and action for the reasons following, to wit:

On February 23, 1932, the defendant herein duly filed and entered in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts its bill in equity against said Boston-Continental National Bank, of which the plaintiff herein is receiver, alleging in effect that the bond and the endorsements thereon declared upon in this action and described in the plaintiff's declaration herein were made without consideration, security, premium charged or paid or intended to be paid, upon the understanding that they were not binding obligations of the defendant herein, upon the assurance and promise of the said bank that they would not be used or enforced against the defendant herein, that said bond and endorsements were executed without authority from the defendant herein and without its knowledge and consent as said bank well knew, and praying that said bank be enjoined from enforcing or attempting to enforce said instruments, that they be declared null and void and be delivered up to be cancelled, and for such other and further relief as may be necessary and proper. A copy of said bill in equity is hereto annexed marked "A" and made a part hereof.

On April 25, 1932, said Boston-Continental National Bank, by John B. Cunningham as receiver, the plaintiff herein, in said Superior Court, filed a petition for the removal of said bill in equity to this

Honorable Court, a copy of which petition is hereto annexed marked B and made a part hereof, upon which said petition said bill in equity was removed from said Superior Court to this Honorable Court on said April 25, 1932.

On May 18, 1932, this defendant filed in this Honorable Court its motion to remand said bill in equity to said Superior Court, which motion, after hearing, was allowed on June 8, 1932; and said bill in equity was thereupon remanded to said Superior Court, and is now pending there and is numbered 39422 upon the equity docket thereof; a copy of said motion to remand and of the order of court thereon are hereto annexed marked respectively "C" and "D" and made parts hereof.

Wherefore the defendant prays that this writ and action may be abated. By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

Then personally appeared Raymond Baldwin and made oath that the statements of fact hereinabove set forth are true. Before me,

E. HAZEL SULLIVAN,
Notary Public.

Dated Boston, Mass., July 19, 1932.

I, Raymond Baldwin hereby certify that I am of the opinion that there is such probable ground for the above answer in abatement as to make it a fit subject for judicial inquiry, and that it is not intended merely for delay.

RAYMOND BALDWIN.

A.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff,

v.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants.

BILL OF COMPLAINT.

1. The plaintiff is a corporation legally established and existing

under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Corporation and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff

without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION
by Joseph Stone, Treas. [SEAL]
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

B.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of Forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston in the event that the

said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of Forty thousand dollars ($40,000.) made on a series of promissory notes aggregating Forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) Ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty-one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollars ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said Bond.

In Witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan

Signed, sealed and delivered in the presence of
Witness

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Telephone Hancock 8811
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

D.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Telephone Hancock 8811
Boston Branch Office 33 Broad Street, Percy G. Cliff, Manager
Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th,

1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff Attorney-in-fact

B.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity, No. 39422

Standard Surety and Casualty Company of New York
v.
Boston-Continental National Bank and Westchester Discount Corporation

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your Petitioners, Boston-Continental National Bank and Westchester Discount Corporation appearing specially without submitting to the jurisdiction of the court but expressly contesting such jurisdiction, and respectfully represent as follows:

1. At all times hereinafter set forth, the defendant Boston-Continental National Bank was a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; that said Bank closed in the regular course of business on Dec. 16, 1931 and did not open thereafter and on Dec. 17, 1931 the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said Bank for the purpose of winding up its affairs; that on Dec. 22, 1931

said Comptroller appointed John B. Cunningham Receiver of said Bank and he duly qualified by executing bond for the faithful performance of his duties as such Receiver in the amount of $400,000; that thereafter, to wit, on the 23rd day of February, 1932, a bill in equity was entered in the Superior Court for Suffolk County by Standard Surety and Casualty Company of New York wherein said Bank is named as a defendant and while the affairs of said Bank were in the hands of said Receiver as aforesaid as the Complainant and its attorneys well knew; that the Complainant did not join the Receiver as party defendant and did not disclose in its bill of complaint the fact that said Bank had ceased to do business some time prior to the filing of the bill and that its affairs were in the hands of a Receiver for the purpose of liquidation; that these facts were well known to the Complainant and its attorneys and were intentionally omitted from the bill of complaint for the purpose of avoiding Federal jurisdiction over the cause.

2. That this cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $40,000 now held by John B. Cunningham as Receiver as an asset of said Boston-Continental National Bank; that it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; that the District Court of United States for the District of Massachusetts has original jurisdiction thereof under Section 24 of the Judicial Code of the United States.

3. That your Petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

4. And your Petitioners offer and file herewith bond with good and sufficient surety for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this Petition of a certified copy of the record in this suit, and for the payment of all costs that may be awarded by said District Court of the United States, if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

5. And your Petitioners further represent that written notice of this Petition and the bond for removal hereinbefore referred to has been

given to the adverse party prior to the filing of the same by sending such notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts whose names appear as attorneys for the adverse party on the subpoena served in this case.

6. And your Petitioners therefore pray that said surety and bond may be accepted, and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this Court.

BOSTON-CONTINENTAL NATIONAL BANK
John B. Cunningham, Receiver
WESTCHESTER DISCOUNT CORPORATION

Commonwealth of Massachusetts

Suffolk, ss. April 22, 1932

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge and belief, Before me, Murray F. Hall
Notary Public

C.

In the District Court of the United States for the District of Massachusetts

Standard Surety Casualty Company of New York, Plaintiff,
v.
Boston-Continental National Bank and Westchester Discount Corporation, Defendants.

MOTION TO REMAND.

Now comes the plaintiff, Standard Surety & Casualty Company of New York, appearing specially for the purpose of this motion only and for none other, and moves this court to remand the above-entitled case to the Superior Court within and for the County of Suffolk in the Commonwealth of Massachusetts for the reasons that (1) This is not a suit arising under the Constitution and laws of the

United States; and (2) it is not a case for the winding up of the affairs of a National Bank.

Attorneys for the Plaintiff.

D.

June 8, 1932.

The receiver not being a defendant and no relief against him being sought the motion to remand is allowed.

H. D. M.

D. J.

This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, May 4, 1933, the following Defendant's Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments, such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that prior to the date of the writ in this action, to wit, on or about December 23, 1930, said Boston-Continental National Bank executed and delivered to said Cliff a release dated December 23, 1930, a copy of which is hereto annexed, whereby, for the consideration therein expressed, said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of Forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston in the event that the said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of Forty thousand dollars ($40,000.) made on a series of promissory notes aggregating Forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) Ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty-one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid

and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said Bond.

In Witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan

Signed, sealed and delivered in the presence of
Witness

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed December 6, 1934.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant;

and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above entitled action and agree that entries may be made of "Judgment for the Plaintiff for $100,000 without costs" and "Judgment Satisfied '."

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

On the tenth day of said December said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

McLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. McLELLAN,

District Judge.

At the same term, to wit, January 31, 1935, the following motion of Frederick S. Deitrick, Receiver, to be Substituted as Party Plaintiff was filed and assented to:

MOTION OF FREDERICK S. DEITRICK, RECEIVER TO BE SUBSTITUTED AS PARTY PLAINTIFF.

[Filed January 31, 1935.]

Now comes Frederick S. Deitrick and says that he was appointed by the Comptroller of the Currency receiver of Boston-Continental National Bank on September 1, 1934, said appointment to take effect at the close of business on September 29, 1934, in place of James H. Brennan, resigned, who in turn succeeded John B. Cunningham, resigned, as receiver of said bank.

Wherefore he moves that he may be substituted as party plaintiff in this action.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

On the said thirty-first day of January, A. D. 1935, the foregoing motion of Frederick S. Deitrick, receiver, to be substituted as party plaintiff was allowed by the court, the Honorable Elisha H. Brewster, District Judge, sitting.

Also on the same day, the following Waiver of Jury Trial and Agreement of Counsel for Consolidation was filed:

WAIVER OF JURY TRIAL AND AGREEMENT OF COUNSEL FOR CONSOLIDATION.

[Filed January 31, 1935.]

Now come counsel for both parties in the above-entitled action and hereby waive trial by jury in this action and agree that this action may be tried with four bills in equity brought by Standard Surety & Casualty Company of New York against Boston-Continental National Bank, its receiver and others now pending in this court and numbered Equity 3849, 3850, 3851 and 3852; and may be tried with the other

actions at law pending between the same parties and numbered Law 5316 and 5317.

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR,
Attorneys for the Plaintiff.

STEWART & CHASE,
Attorneys for the Defendant.

At the same term, to wit, February 2, 1935, plaintiff's motion for auditor was filed.

On the fourth day of said February, A. D. 1935, the following Rule to Auditor was filed:

RULE TO AUDITOR.

February 4, 1935.

No. 5225, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

No. 5316, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

No. 5317, Law Docket.

Frederick S. Deitrick, Receiver of the Boston Continental National Bank,

v.

Standard Surety & Casualty Company of New York, et Trustee.

McLELLAN, J. These causes came on to be heard at this term upon plaintiff's motion filed in each case for reference to an auditor, and it appearing to the court that these are proper causes to be heard by an auditor, and neither party objecting thereto, it is

Ordered that W. Barton Leach, Esquire, of Weston, Massachusetts, be, and he hereby is, appointed auditor in the above-entitled actions

to hear the parties and their witnesses, to examine their books, vouchers and evidence, and to report to the court his findings of fact and conclusions of law thereon, said findings of the auditor to be final.

It is further ordered that the auditor may sit anywhere within the District as he may determine; or elsewhere by consent of parties, and that said hearings shall begin on March 11, 1935, and be completed on or before April 1, 1935; that his compensation as auditor in the above-entitled actions and as special master in equity cases Nos. 3849, 3850, 3851 and 3852, between the same parties, shall be at the rate of seventy-five dollars per day; and that the compensation plus expenses and stenographer's fees of said auditor and master shall be paid equally from time to time by the parties and be taxed as costs against the losing party.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

February 4, 1935.

H. D. M.
D. J.

Also at the same term, to wit, February 16, 1935, the following Notice of Frederick S. Deitrick, Receiver, to Admit Facts was filed:

NOTICE OF FREDERICK S. DEITRICK, RECEIVER, TO ADMIT FACTS.

[Filed February 16, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

And now comes Frederick S. Deitrick, as he is receiver of Boston-Continental National Bank in each of the above-entitled actions, and calls upon Standard Surety & Casualty Company of New York to admit the following facts as to each of such actions:

1. That there was an original general power of attorney duly issued by Standard Surety & Casualty Company of New York to Percy G. Cliff or R. L. Carven dated the fifth day of October, 1929 of which the photostatic copy hereto annexed marked A is an exact copy.

2. That the general power of attorney referred to in paragraph 1

hereof was in full force and effect from the fifth day of October, 1929, up to and including the seventeenth day of December, 1931.

3. That the copies of the letters hereto annexed and dated respectively December 21, 1931, June 28, 1932, July 8, 1932 and November 4, 1932.

(a) are true copies of the originals of said letters received by Standard Surety & Casualty Company of New York;

(b) were sent to the Standard Surety & Casualty Company of New York by registered mail;

(c) were mailed by the Boston-Continental National Bank or its receiver upon the dates which said letters respectively bear; and

(d) that each of said letters respectively was received by Standard Surety & Casualty Company of New York in the regular course of the mails shortly after the date which each of said letters bears and were received at its home office in New York City.

4. That at all times while the general power of attorney referred to in paragraph numbered 1 hereof was in full force and effect, Standard Surety & Casualty Company of New York was duly and legally qualified within the Commonwealth of Massachusetts to do all of the kinds of business covered by said power of attorney.

5. That at all times between October 5, 1929 and December 17, 1931, Percy G. Cliff was duly and legally registered in Massachusetts as a general agent of Standard Surety & Casualty Company of New York with full power to write insurance business of the nature covered by the general power of attorney referred to in paragraph numbered 1 hereof.

6. That Percy G. Cliff from time to time between October 5, 1929 and December 17, 1931, acted as the General Manager of the Boston office of Standard Surety & Casualty Company of New York and acting under the power of attorney referred to in paragraph 1 hereof transacted business authorized thereby within the Commonwealth of Massachusetts.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR.

A.

Standard Surety & Casualty Company of New York
Home Office 80 John Street, New York

No. 1038

GENERAL POWER OF ATTORNEY

Know All Men By These Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make, constitute and appoint Percy G. Cliff or R. L. Carven its true and lawful attorney-in-fact with full power and authority at – – – – – to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation, and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to

seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any of the By-Laws of the Company, and to any Resolution adopted by its Board of Directors.

In Witness Whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By John R. English, Vice-President.

Attest: Edward J. Halligan, Assistant Secretary.

State of New York
City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English, to me known, who, being by me duly sworn, did depose and say: That he resides in the State of New Jersey; that he is Vice-President of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority. F. H. Colquhoun,
Notary Public.

December 21, 1931

Standard Surety & Casualty Co. of N. Y., 80 John Street, New York, N. Y.

Gentlemen: In view of the default of the Westchester Discount

Corporation of Mt. Vernon, New York, to pay their obligations bonded by your company to the Boston-Continental National Bank in the amount of not to exceed $40,000, we are writing you by registered mail as required in the wording of the original bond and the extension thereof, demanding payment of $40,782.81 which is that portion of the indebtedness unpaid as of December 20, 1931. The original bond I refer to was executed over the signatures of Joseph Stone, Treasurer of the Westchester Discount Corporation, and Percy G. Cliff, attorney in fact, for the Standard Surety & Casualty Company of New York. Please give this matter your immediate attention and acknowledge receipt of this letter at once.

On November 12, 1931, I wrote to your home office at 80 John Street with reference to the obligation of Gordon A. Robinson, doing business as the Robinson Engineering Company. The subject of this letter referred to the extension of their note with $1,000. monthly payments during the term of a bond held by us signed by Percy G. Cliff, Manager of your Boston branch office. Will you please inform us why we have not heard from you in respect to this matter?

Very sincerely yours,

OA:MH Enclosure—1 Vice President.

P. S. I am enclosing copy of our letter of November 12, 1931, copies of which were sent to Percy G. Cliff and the Robinson Engineering Company.

File No. 1911.

John B. Cunningham, Receiver Boston Continental National Bank
60 Devonshire Street, Boston, Massachusetts.

June 28, 1932

Standard Surety & Casualty Co. of New York, 80 John Street, New York, N. Y.

Gentlemen: You are hereby notified that Joseph Stone of Brockton has defaulted in the payment of his obligation of $52,000. to Boston-Continental National Bank which obligation became due and payable June 2, 1932. Under the terms of the written instrument or bond executed by you as surety under date of June 2, 1931, and being

numbered 9485-31, payment of $52,000. is hereby demanded from you to be made within thirty (30) days of the receipt of this notice.

Very truly yours,

Registered Mail Receiver

July 8, 1932.

Standard Surety & Casualty Company of New York, 80 John Street, New York, N. Y.

Re: Standard Surety & Casualty Company of New York
Bond No. 12420-31 In the Amount of $20,000.

Gentlemen: I hereby notify you that Gordon A. Robinson has defaulted in payment of note of $20,000.00 referred to in the above bond, and in accordance with the terms of said bond I hereby demand payment of $19,000.00, the balance due and unpaid on said note, within thirty (30) days together with interest.

Very truly yours,

J. B. CUNNINGHAM, Receiver.

Registered Mail Return Receipt Requested

November 4, 1932

Standard Surety & Casualty Company of New York, 80 John Street, New York, N. Y.

Re: Standard Surety & Casualty Company of New York
bond dated September 6, 1930 in the Amount of $20,000
in favor of Continental National Bank.

Gentlemen: I hereby notify you that Arthur D. Cronin has defaulted in payment of note of $14,000 referred to in the endorsement dated November 2, 1931, extending the term of the above bond to November 3, 1932.

In accordance with the terms of said bond, I hereby demand payment of $14,000, the amount of said note, together with interest, within thirty days of this notice.

Yours very truly,

JOHN B. CUNNINGHAM,
as he is Receiver of Boston-Continental National
Bank (formerly known as Continental National Bank.)

Registered Mail Return Receipt Requested.

On the twenty-fifth day of said February, the following Answer to Receiver's Notice to Admit Facts was filed:

ANSWER OF STANDARD SURETY & CASUALTY COMPANY TO RECEIVER'S NOTICE TO ADMIT FACTS.

[Filed February 25, 1935.]

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 In Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

1. An original power of attorney was issued by the Standard Surety & Casualty Company of New York to Percy G. Cliff or R. L. Craven, dated the fifth day of October, 1929, of which the photostatic copy annexed to the notice to admit facts appears to be an accurate copy.

2. The power of attorney referred to in paragraph 1 of the notice to admit facts was in force, except as modified by restrictions and limitations known to Percy G. Cliff, and instructions communicated to him by the Standard Surety & Casualty Company of New York, from October 5, 1929 to December 17, 1931, inclusive.

3. The copies of letters annexed to the Notice to Admit Facts, and dated December 21, 1931, June 28, 1932, July 8, 1932 and November 4, 1932, appear to be true copies of letters received by the Standard Surety & Casualty Company of New York at its home office in New York City in the regular course of the mails shortly after the date which each letter bears.

4, 5, 6. As to the purported facts and conclusions of which the receiver seeks admissions in paragraphs 4, 5 and 6 of his notice to admit facts, the Standard Surety & Casualty Company of New York refuses to admit as facts the matters as there set forth.

By its Attorneys,

STEWART & CHASE,
RAYMOND P. BALDWIN.

This cause was thence continued to the March Term, A. D. 1935, when, to wit, March 22, 1935, the following Motion to Amend Defendant's Answer was filed and allowed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed and allowed March 22, 1935.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 4 thereof, the following:

"5. And for further answer, and as a bar to the plaintiff's action, the defendant says that the said Boston-Continental National Bank was the obligee on certain "Banker's Blanket Bonds" issued by the Fidelity & Deposit Company of Maryland, indemnifying said bank against the losses therein specified; that on or about April 8, 1932,

said bank, through its receiver John B. Cunningham, notified said Fidelity & Deposit Company of certain losses which, as he claimed, were covered by said bonds; that on or about April 28, 1932, said bank through its said receiver supplemented its said claim by a letter to said Fidelity & Deposit Company, a copy of which is hereto annexed and made a part hereof; that subsequent thereto and on or about June 2, 1932, said bank through its said receiver, pursuant to the provision of said bonds and in order to recover thereon, filed with said Fidelity & Deposit Company a proof of claim under said bonds, subscribed and sworn to by its said receiver, by which said receiver sought to recover on said Bankers Blanket Bonds on the theory that the alleged bond upon which the action at bar is brought was fraudulent, invalid and uncollectible as stated by said receiver; that subsequently said receiver brought in this court an action against said Fidelity & Deposit Company (No. 5498 Law) in which he sought recovery on said bond in accordance with said claims and theory, and that the plaintiff in said action, who is the plaintiff in the action at bar prosecuted said claims to judgment in said action. Wherefore the defendant says that the plaintiff is barred from recovery on said alleged bond against the defendant in this action."

By its Attorneys,

STEWART & CHASE,
RAYMOND P. BALDWIN.

March 22, 1935. The within motion is allowed.

HUGH D. MCLELLAN, *D. J.*

File No. 1911

John B. Cunningham, Receiver Boston-Continental National Bank
60 Devonshire Street, Boston, Massachusetts

April 28, 1932

Fidelity & Deposit Company of Maryland, 33 Broad Street, Boston, Massachusetts

Attention—Mr. Wilson H. Smith

Gentlemen: Supplementing my letter dated April 8th, you will please find below a resume setting forth specific irregular transactions

which would appear to result in a total loss to my trust aggregating approximately $285,000.00.

1. Bank's loan to Joseph Stone dated April 29, 1930 due and payable July 28, 1930, in the principal amount of $25,000. Said loan was secured by bond of the Metropolitan Casualty & Insurance Company of New York in like amount. This bond was delivered to President, T. M. Ragan upon his request and said bond has since disappeared. Stone, the maker of the loan, is not in a position to pay and through the apparent irregularities on the part of former President Ragan, as relating to the disappearance of bonds, my trust stands to lose $25,000. and interest.

2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York purported to be issued to cover loan of this bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount of $40,000, said loan due and payable April 23, 1931. As a result of fraudulent bond in the amount above stated, my trust stands to lose $40,000. and interest.

The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

3. A loan made by this bank to the Colonial Realty Corporation of which Joseph Stone was an officer in the amount of $40,000, dated December 30, 1930, due and payable $10,000, January 29, 1931, $20,000 March 2, 1931 and $10,000 March 30, 1931, on which loan the following payments were made: January 30, 1931, Stone paid $10,000. leaving a balance unpaid of $30,000. and interest.

This loan was fraudulently approved by Mr. T. M. Ragan, President of the bank after the Board of Directors had refused to make this loan at their regular meeting.

4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000. purported to be issued on June 2, 1931, as security on loan to Joseph Stone, personally, in said amount. This bond was invalid and resulted from the fraudulent conspiracy of T. M. Ragan, President with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of

New York. The amount of the loan is uncollectable, and my trust stands to lose the full amount of $52,000. and interest.

5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000. purported to be executed to secure loan on July 8, 1931 to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff and Gordon A. Robinson, and as a result of the fraud by trust stands to loss $15,000. and interest.

6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York in the amount of $20,000. as security on loan to Arthur D. Cronin made on August 23, 1930. The fraudulent issuance of this bond was made under the same circumstances as the other bonds except in this case Arthur D. Cronin participated. The amount of the loan is uncollectable and my trust stands to lose the amount of $20,000 and interest.

The above four bonds form the basis of indictments returned by the Federal Grand Jury against Joseph Stone, Percy G. Cliff and Arthur D. Cronin, and copies of said indictments are enclosed herewith.

7. Note of Mortimer H. Richardson purporting to be signed by Mortimer H. Richardson in the amount of $5400, dated July 5, 1930, due on demand. This note was fraudulently signed by T. M. Ragan, President of the bank, in the name of Mortimer H. Richardson. Mr. Ragan turned over $1,200. to Mr. Richardson to pay this note. The balance of $4,000. is uncollectable and due to the fraud of Mr. Ragan, my trust stands to lose $4,000. and interest.

8. Note purporting to be signed by Dr. Justin F. Grant, dated July 22, 1931 for $13,000. due and payable October 20, 1931. Mr. Ragan fraudulently signed Dr. Grant's name to this note and received the benefit from the proceeds of this loan. This note is uncollectable and my trust stands to lose $13,000. and interest.

9. Loans to Crescent Shoe Company, Keene, New Hampshire, and Peter Kantor, Treasurer. The Crescent Shoe Company owed the bank $61,000. of which $6,500. represented a personal loan to Mr. Kantor. Mr. T. M. Ragan, President of the bank had borrowed

personally from Mr. Kantor $12,500. of which amount $2,500. represented an indebtedness of Joseph Balter, a director of the Boston-Continental National Bank. On November 25, 1931, Mr. Kantor gave Mr. Ragan, as President of the bank, check for $47,900.00. Mr. Ragan made out two checks, one for $10,600, and another check for $2,500. payable to Crescent Shoe Company which he asked Mr. Kantor to endorse. Mr. Kantor endorsed said checks and received all of the notes of the Crescent Shoe Company and personal notes of Peter Kantor stamped "paid" from the note teller of the bank. Mr. Ragan did not turn over to the bank $13,100. representing the difference between the loans of $61,000. and the check for $47,900. This balance is uncollectable and due to the fraudulent conduct of Mr. Ragan, as President, my trust stands to lose $13,100. and interest.

10. Cash received by T. M. Ragan, President in the amount of $3,500. on December 16, 1931. On this date Mr. Ragan received $5,500. cash from the paying teller stating that a check in like amount would be given to him later. About midnight the following morning, Mr. Ragan sent a check of Arthur D. Cronin & Company in the amount of $5,500. to the paying teller to cover the cash withdrawal of Mr. Ragan. At that time the Arthur D. Cronin & Company account had less than $1,000. to its credit. Mr. Ragan caused a check in the amount of $6,325. in the name of Daniel Owen, which check he had received from Arthur D. Cronin, to be deposited in the Arthur D. Cronin & Company account to cover the overdraft covered by the charge of the $5,500. in Cronin's account. The Daniel Owen check was drawn on the Bank of Canada and was returned "unpaid." On account of the fraudulent conduct of Mr. T. M. Ragan, this trust stands to lose $5,500. and interest, as this amount is uncollectable from either Arthur D. Cronin & Company or Daniel Owen.

11. $3,500. paid to T. M. Ragan, President, on December 16, 1931, in the following manner: Mr. Ragan received this cash for three checks totalling $3,500. drawn by E. E. Nazzaro & Company, Inc. on the Plymouth County Trust Company of Brockton, Massachusetts (now closed), an account which was kept there for Mr. Ragan's personal use. The three checks were returned "unpaid" and

are uncollectable from the drawer or from Mr. Ragan's estate. Due to the fraudulent conduct of Mr. Ragan, this trust stands to lose $3,-500, and interest.

12. Loss of $14,808.86 due to items fraudulently kept as cash items in the following manner:—Mr. T. M. Ragan fraudulently purchased capital stock of the Boston-Continental National Bank with the bank's own funds and then carried the stock as cash on hand. The stock of the Boston-Continental National Bank is worthless due to the fact the Boston-Continental National Bank is in the hands of a National Bank Receiver.

13. Cash loss of $4,300. due to the following irregular transactions of Mr. Ragan.—Mr. Ragan received cash for which he gave expense tickets to be charged to the expense account as follows:—On July 16, 1931 $200.00, September 26, 1931 $100.00, October 8, 1931 $1,000.00, October 16, 1931 $1,000.00, October 31, 1931 $1,-000.00, December 11, 1931 $1,000.00, total of $4,300.00, all of these items were fraudulently described as expense items. As nothing can be collected from Mr. Ragan's estate, my trust stands to lose $4,-300.00.

14. Notes purporting to be executed by Mark Levine totalling $19,000. Mr. T. M. Ragan, President, fraudulently signed or caused to be signed the name of Mark Levine to notes amounting to approximately $19,000, which were discounted with the bank and the proceeds used by Mr. Ragan, personally. As a result of this my trust stands to lose $19,000. and interest.

15. A note of $1,903.80 of James W. Batchelder was discounted by Mr. T. M. Ragan, President, for the account of Margaret H. Casey. Mr. Ragan received the proceeds of this note in the form of a cashier's checks payable to Margaret H. Casey, bearing endorsement of Margaret H. Casey. Mr. Ragan fraudulently caused said endorsement to be placed on the bank of this check without her knowledge or authority. Mrs. Casey knew nothing about this transaction and received nothing out of this amount. My trust stands to lose $1,903.80 and interest.

16. Loan of $6,000. to the Blake Process & Machine Company of which James A. Blake was President, Harold K. Osgood, law

associate of Mr. T. M. Ragan's, director, and Ruth Dennis, secretary, was clerk and director. The Industrial Loan & Discount Corporation of which Mr. Ragan was President had a chattel mortgage on all of the personal property of the Blake Process & Machine Company, that mortgage was foreclosed and the company went into the hands of receivership. At the time the $6,000. loan was made, Mr. Ragan knew that the company was financially irresponsible and on account of his fraud my trust stands to lose $4,579.90 and interest, the unpaid balance on this loan.

17. Loan to Irving Kopelman of $40,000. made on July 6, 1931, due and payable October 2, 1931. Mr. Kopelman claims that of this amount he turned over $13,000. to Mr. Ragan for his benefit. Mr. Ragan knew at the time the maker of the loan was irresponsible. Due to the fraud of Mr. Ragan, the bank stands to lose $13,000 and interest.

18. Loans totalling $45,000. were made to E. E. Nazzaro & Company, Inc. on notes secured by collateral, which notes were discounted by the bank and the proceeds were given to Mr. Ragan for his personal use. At the time the notes were discounted Mr. Ragan knew that the maker was irresponsible and that the notes were only collectable out of the collateral. There will be a deficit of around $13,000. after the application of the collateral, and due to the fraudulent conduct of Mr. Ragan, this trust stands to lose $13,000. and interest.

All of the above irregularities on the part of Mr. T. M. Ragan, President of the bank were to be presented to the Federal Grand Jury on the morning of Tuesday, March 1, 1932. Owing to the fact that Mr. Ragan was found dead in his garage around 11:00 A. M. on said morning, these matters were not presented to the Federal Grand Jury so far as Mr. Ragan was concerned.

If further information is desired kindly let me know.

These claims are made without prejudice to further claims due to other irregularities which may lead to the filing of proper claim under the bonds written by your company.

Yours very truly,

JOHN B. CUNNINGHAM, Receiver

JBC:MH Encls.

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

These seven cases raise the question whether the Standard Surety & Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical.

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The equity cases have been referred to me as master, and the law cases as auditor under a stipulation that findings of fact shall be final.

The Surety Company contends that it is not liable upon the bonds and is entitled to cancellation thereof upon four grounds:

(1) That the bonds were given by Cliff without authority and without consideration as part of a fraudulent scheme of Cliff and Ragan, the bank's president, designed to deceive various persons as to the soundness of these notes; that Ragan knew of the lack of authority and consideration; and that his knowledge binds the bank and the receiver.

(2) That even if the bonds are binding obligations of the Surety Company they do not cover the now existing obligations of the four note-makers, for various reasons having to do with interpretation of the language of the bonds.

(3) That the notice of default stipulated in the bonds was not given and that such notice is a condition precedent to recovery.

(4) That the receiver by bringing a certain suit against the Fidelity & Deposit Company of Maryland elected a remedy which was inconsistent with the remedy now sought, and that the Surety Company was thereby discharged of any liability otherwise existing.

The facts and the law as to the third defense (notice of default)

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and the fourth defense (election of remedy) are capable of segregation from what may be termed the substantive issues of the cases. Consideration of these questions is therefore postponed until a later portion of this report.

Liability of the Surety Company Apart from Notice of Default and Election of Remedy.

Findings of Fact.

a. The Bank, its President and its Receiver.

For some time prior to August, 1930, Terrell M. Ragan had been president of the Continental National Bank of Boston. On December 27, 1930, this bank consolidated with the Boston National Bank. The consolidated institution was known as the Boston-Continental National Bank. Ragan remained as president of the Continental to December 27, 1930, and was president of the Boston-Continental thereafter until it closed its doors on December 17, 1931. It was then taken over by a receiver appointed by the Comptroller of the Currency under 12 U. S. C. sec. 191. The successive receivers have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick, the last of these having been appointed in October, 1934. In this report "the bank" refers to the Continental National Bank with reference to events up to December 27, 1930, and to the Boston-Continental National Bank with reference to events after that date. There is no contention that the Boston-Continental National Bank does not stand in the same position as the Continental National Bank with reference to the Surety Company.

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b. The Cronin Transaction.

In early August, 1930, Ragan was indebted to one Cronin in an amount exceeding $20,000. Cronin owed something more than

$19,000 to O'Brion Russell & Co. and was being pressed for payment. Cronin had given a check for $19,000 to O'Brion Russell & Co. drawn on the bank, but there was no substantial balance in his checking account. Cronin left for a trip to Nova Scotia and sent to Ragan a thirty-day note upon the bank's form, signed by Cronin in the amount of $20,000; he told Ragan that the check for $19,000 would be presented and that if it were not paid both Cronin and Ragan would be in trouble. On August 23, 1930, Ragan handed Cronin's note to one Harold J. O'Donnell (who was discount clerk and assistant cashier in charge of the loan department of the bank from August, 1930 to December 17, 1931) and told him to discount the note and credit the proceeds to Cronin's checking account. This was done. Cronin's check for $19,000 was shortly presented by O'Brion Russell & Co. and was paid. The purpose of Ragan in making the loan to Cronin was to enable this check to be paid and to keep Cronin and Ragan out of trouble. The note was unsecured and was known by Ragan not to be a sound investment for the bank.

Shortly after the 1st of September, 1930, Cronin and Ragan had a talk with Percy G. Cliff, who was at all material times attorney-in-fact of the Standard Surety & Casualty Company of New York. They asked Cliff to write a bond of his company purporting to secure the Cronin note and to deliver it to Ragan. Ragan, to induce Cliff to give the bond, said that it would be used to show the bank ex-

aminers if they asked to see the collateral on the Cronin note; that Ragan would keep this bond in his own personal file; that Cliff need not notify his company of the bond or keep any record of it in his office; that no premium would be paid; that the bond was simply a piece of "window dressing"; that the bond was valueless, imposed no liability and would not be enforced; that the bond would be returned to Cliff within a few days; that Ragan would give Cliff a release of all liability on the bond running to the Surety Company. At other times Ragan referred to the bond as "wall paper" and a "donkey bond".

Cronin drew up the bond on stationery provided to Cliff by the Surety Company. Cronin and Cliff signed and sealed it. In so doing

Cliff relied on Ragan's statements. The bond purports to secure the Cronin note. A copy appears as Exhibit A to this report. Attached to this bond was a copy of Cliff's power of attorney authenticated by the assistant secretary of the company. Cliff had been provided with a number of these copies (and some originals) to be attached by him, as indicia of authority, to bonds which he might write. This instrument empowered Cliff on behalf of the company

> "To make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise . . . to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company at the office of the Company in New York, New York, in their own proper persons."

A copy of the power of attorney is Exhibit B to this report.

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At the time Cliff was created attorney-in-fact for the Surety Company and given his power of attorney there was delivered to him a printed "letter of instructions". The letter stated that Cliff's power of attorney was unlimited and general in its terms as to the kind of obligation covered, pointed out that powers had to be given in that way for the convenience of approving officers who might not have the knowledge or time which would be required to examine every bond carefully with reference to a limited power of attorney, but added that the power was to be used only in accordance with the terms of the letter of instructions. "We urge you with all firmness never to put the company on a risk by executing a bond unless you are certain that the bond is one included in your authority. In case of doubt, even if delay may result in the loss of the business, do not write the bond. Better be safe than sorry."

The letter enumerated a dozen types of bonds (none of which types included note-guaranty bonds) which the attorney-in-fact was permitted to execute without prior authority from the home office in

each specific instance, and then declared that applications for bonds of all other classes must be referred to the home office by letter or telegram for authorization in each specific instance. The letter specifically denied to the attorney-in-fact authority to execute "supplementary agreements, waivers, acceptances of changes in contracts, etc.". This letter was not called to the attention of Ragan or anyone else connected with the Bank. But at the time Ragan was arranging with Cliff for the Cronin bond Cliff told Ragan (what would have

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been obvious to anyone and was obvious to Ragan) that Cliff had no authority to do what he was doing and that the bonds could not be reported to the home office. The writing of bonds without premium was not within Cliff's apparent authority.

At the time Cliff delivered the Cronin bond to Ragan, and as part of the same transaction, Ragan delivered to Cliff a paper dated September 9, 1930, signed by him as president for the Continental National Bank, purporting to release the Standard Surety & Casualty Company from any obligation upon the Cronin bond. A copy of this release is attached as an exhibit to the bill of complaint in No. 3850 Equity. The terms of the instrument are broad enough to discharge the Surety Company. There is no evidence that Ragan had authority to execute such a release other than the fact that he was president of the bank.

When Ragan received the Cronin bond from Cliff he delivered it to O'Donnell as collateral for the Cronin note. O'Donnell deposited the bond in the collateral files of the bank, which were in his charge. Cliff did not know that this bond, or others, was delivered to O'Donnell.

Neither Cliff nor the Surety Company received any compensation or collateral for writing this bond; Cliff kept no record of the transaction and did not report it to the home office of the Surety Company; the home office first learned of the existence of this bond on December 23, 1931. In writing the Cronin bond Cliff relied upon what Ragan said to him. The same facts are true with regard to the other three bonds in question and all "endorsements" or extensions.

The original Cronin note was for $20,000. It matured on Sep-

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tember 22, 1930. On that date Cronin paid $1500 and gave a new note for $18,500 maturing October 22, 1930. New notes were given in like manner at ten other times. On some of these ten other occasions the new note was for a smaller amount than the old because of a cash payment; on others the new note was for the same amount since there was no cash payment. On some occasions the new note was not given until some time after the maturity of the old, the longest interval being sixty-three days. However, the new note always bore as its date the maturity date of the old note. The last note in this series was for $14,000 given December 9, 1931, dated October 2, 1931, maturing January 4, 1932. It has not been paid in any part.

When a new note was given the old note was stamped "cancelled" and returned to Cronin. When Cronin gave a new note he understood that his obligation to the bank was being renewed, with or without reduction in amount. He did not understand that his obligation was being discharged and a new obligation created. Each of these new notes was discussed at a meeting of the board of directors of the bank at or about the time of maturity of the old note. The new notes were always referred to as "renewals" and "renewal" notes were discussed as a group separately and apart from original loans and notes. I find that both Cronin and the bank intended each new note as a renewal of the old, in whole or in part, and not as a payment. So far as it is a question of fact I find that each new note was a renewal or extension of the note first given.

On March 21, 1931, Cliff at the solicitation of Cronin and Ragan delivered to Ragan an "endorsement", signed by Cliff as attorney-in-

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fact for the Surety Company, purporting to extend the Cronin bond in the amount of $15,000 to May 22, 1931. Another "endorsement" was given on May 21, 1931, purporting to extend the bond in the amount of $15,000 to November 3, 1931. A third "endorsement" was given on November 3, 1931, its terms identical to those of the other two extensions *mutatis mutandis*. It appears as Exhibit C to

this report. Each of these "endorsements" was given by Cliff to Ragan and by Ragan handed to O'Donnell.

c. The Westchester Discount Corporation Transaction.

In December, 1930, Ragan asked Cliff to write a similar bond with reference to a note of the Westchester Discount Corporation in the amount of $40,000. Ragan told Cliff that the Westchester loan was being made to enable Ragan to take up for his own account some stock in a proposed consolidated bank to be formed by the merger of the Continental National Bank with the Boston National Bank; that the loan was amply secured but that there was some possibility of criticism because of the kind of collateral; that the Continental National Bank was going to merge with the Boston National Bank if the bank examiners could be satisfied; that the bank examiners required that 10,000 new shares of stock be subscribed for at 20, and that Ragan had to take up $40,000 of this stock; that the bank examiners might not be satisfied with the Westchester loan unless it were further secured; and that if the merger did not go through the bank examiners might close the bank, and Cronin, Ragan and Cliff would

be ruined. He assured Cliff that the bond, like the Cronin bond, would be merely a piece of window dressing, that there would be no liability under the bond, that a similar release would be given and that both bonds would be returned to Cliff within a few days.

Cliff gave the bond as requested and attached to it an original of his power of attorney. The text of the bond appears in Exhibit D to this report. It is to be observed that the condition of the bond is the payment by Westchester Discount Corporation of four notes dated December 20, 1930, for $10,000 each, maturing at thirty day intervals beginning with January 20, 1931. There never were any notes for $10,000 made by Westchester Discount Corporation and held by the bank. There was one note of the Westchester Discount Corporation for $40,000 dated December 23, 1930, maturing in four months and purporting to be secured by "4 notes signed by Legion Parkway Realty Corp. . . . Val. $40,000". There was no evidence as to whether these latter four notes were endorsed by Westchester Discount Corporation or whether they were ever paid.

Cliff received a release dated December 23, 1930, executed by Ragan for the bank, which was broad enough in terms to release the Surety Company from all liability under the Westchester bond. There was no evidence that Ragan had authority to execute this release, except the fact that he was the bank's president.

Ragan, after receiving the bond from Cliff, delivered it with the Westchester note to O'Donnell with instructions to discount the note and credit the proceeds to the account of the Westchester Discount Corporation. This O'Donnell did.

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The Westchester Discount Corporation paid $1050 on account of this loan on January 20, 1931. No other amount was ever paid. No new note was given.

On April 20, 1931, Cliff at the solicitation of Ragan delivered to Ragan an "endorsement" signed by Cliff as attorney-in-fact for the Surety Company purporting to extend the Westchester bond in the full amount to June 20, 1931. A second "endorsement" was given on June 20, 1931, its terms being identical to those of the first "endorsement" *mutatis mutandis*. It appears as Exhibit E to this Report.

d. The Stone Transaction.

On June 2, 1931, Joseph Stone owed the bank $51,700 upon existing notes. On that date Ragan told Cliff that the bank examiners were in the bank; that there was a note of Stone's in an amount which, with interest, would exceed $52,000; that he had told the examiners that this loan was covered by a bond; and that if Cliff would give another bond for $52,000 to be shown to the bank examiners Ragan would be able to give him back all three bonds. Cliff gave the bond on June 2, in the form of Exhibit F to this report. No power of attorney or copy of a power was attached to this bond. A release dated June 4, 1931, was given as in the two previous cases, its terms being broad enough to release the Surety Company from all obligation. There was no evidence of Ragan's authority to give the release except that he was the bank's president. On June 4 a new note was given by Stone which increased his total indebtedness to

the bank to $52,222.75. This increase represented the amount of

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the discount on the new note, which customarily is paid in cash at the time a renewal note is given but which in this instance was added to the principal obligation. The indebtedness of Stone to the Bank dates from July, 1930, at which time original notes were given and the proceeds thereof were received by Stone. The notes existing on June 2, 1931, were renewals of these original notes. There were no "endorsements" with reference to the Stone bond.

The indebtedness of Stone, totalling $51,700 on June 2, 1931, and $52,222.75 on June 4, 1931, was represented by several notes. The total indebtedness of Stone to the bank upon these notes and other notes given in substitution therefor was at no time less than $52,000 between June 4, 1931, and the present date. As any note of Stone's fell due between June 4 and December 17, 1931, a new note was given by Stone, the procedure being the same in all respects as in the case of Cronin. Stone's intention in making these new notes was the same as that of Cronin; the bank's practice and intention with reference to new notes of Stone were the same as with reference to new notes of Cronin. I find that both Stone and the bank intended each new note as a renewal of the old, and not as a payment, and that both intended the original obligation to continue. So far as it is a question of fact I find that each new note was a continuation of the obligation existing on June 2, 1931.

e. The Robinson Transaction.

On July 7 and 8, 1931, Ragan told Cliff that a loan was to be made to Gordon A. Robinson, doing business as Robinson Engineering Company, for $20,000; that the loan was really for the benefit of

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Cronin, who was Robinson's brother-in-law, but that there had been some criticism of the Cronin loan so that it was inadvisable to give the loan in Cronin's name; that Cronin was to get the money; that the note was to be secured by a certificate of deposit for $4,500 but that additional security was necessary and a bond was needed, that a release would be given as in the other cases, that this would be the

last bond Cliff would have to write. Ragan told Cliff why a bond was needed, but Cliff has forgotten the reason given. Cliff, however, understood that this bond, as well as the others, was to be used for the purpose of giving the appearance that the loan was secured by a surety bond, and he knew that the bond was to be shown to the bank examiners.

Cliff gave the bond on July 8, in the form indicated by Exhibit G to this report. No power of attorney or copy was attached to this bond. Later on the same day, and as part of the same transaction, Ragan delivered to Cliff a release in substantially the same form as the previous releases, the release being broad enough in terms to release the Surety Company from all obligation under the bond. There was no evidence of Ragan's authority to give the release except his position as the bank's president. The bank on July 8, 1931, after receiving this bond, discounted a note of Robinson's for $20,000, maturing November 9, 1931, put $4,593.33 of the proceeds under a certificate of deposit which was additional security for the note, and credited Robinson's account with $15,406.67. Cronin got the amount thus credited. The loan was made for his benefit.

On November 12, 1931, three days after the maturity of this note,

$1,000 was paid to the bank on account of this obligation, and Robinson at the solicitation of Cronin gave a new note for $19,000 maturing December 9, 1931. There was no evidence as to the intention of Robinson in giving this new note. The intention of Cronin, so far as material, was the same as with reference to new notes signed by himself; the intention and practices of the bank were the same as in the case of Cronin's new notes. I find that Cronin and the bank intended the new note as a renewal of the old and not as a payment. So far as it is a question of fact, I find that the new note was a renewal of the old and not a payment thereof. No other renewal or extension was given. By application of the certificate of deposit and by other payments the balance due on the Robinson account has been reduced to $14,403.52, exclusive of interest. There were no "endorsements" given with reference to the Robinson bond.

f. Certain general findings with reference to the acquisition of the bonds and the making of the loans.

All of the foregoing transactions were carried out in large part by O'Donnell, acting under Ragan's direction and in performance of his routine duties. When a note was received Ragan handed it to O'Donnell with directions to discount it; and O'Donnell made the necessary book entries and notified the necessary bookkeepers and tellers to carry out this order. When a bond was received Ragan handed it to O'Donnell, who placed it in the collateral files of the bank which were in his charge. Occasionally O'Donnell reminded

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Ragan that one of the bonds was expiring and needed extension by an endorsement. O'Donnell also reminded note-makers of the maturity of their notes and the necessity of payment; but he had, and exercised, no authority to take renewal notes in lieu of payment without orders from a superior. With reference to the transactions heretofore described, O'Donnell at no time acted in an independent executive capacity. Neither he nor any other officer or employee of the bank except Ragan had anything to do with negotiating for the bonds and "endorsements" here in question.

Neither O'Donnell nor any other employee or officer of the bank, except Ragan, knew or had reason to know that there was any limitation upon Cliff's authority or any infirmity in these bonds or that the bonds were not the binding obligations they purported to be, until after the bank had closed its doors. The bonds and the notes they secured were discussed at directors' meetings and Ragan, at the request of a director, produced one or more of the bonds. All of the loans and renewals were granted by Ragan without prior consultation with the directors. But each loan and renewal was reported to the directors shortly after it was made; and each was approved by them. In thus approving the directors relied upon the bonds; and this reliance was reasonable.

The Surety Company under its charter and its admission to do business in Massachusetts was empowered to write bonds of the type

here in question. Cliff was a duly licensed agent of the Surety Company. The terms of his power of attorney were sufficiently

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broad to cover authorization to write bonds of the type here in question. The Surety Company supplied Cliff with forms of bonds, letterheads and its corporate seal.

Cliff's reputation for probity in Boston and in the insurance business generally was excellent. The Surety Company was not negligent in employing him or in furnishing him with the power of attorney, stationery and seal. The officers and agents of the bank other than Ragan were not negligent in failing to suspect wrongdoing on his part. There is no indication that Cliff personally benefited from the writing of any of these bonds. Cliff was told specifically that these bonds were to be shown to the bank examiners if called for. From the general circumstances surrounding the writing of the bonds (heretofore set forth) I infer and find that Cliff also knew that these bonds would be shown to the bank's directors, to the representatives of the Boston National Bank in merger negotiations, and to any other person entitled to enquire as to the soundness of the notes they purported to secure, and that the purpose of the showing would be to deceive the person so enquiring.

g. Reliance upon the bonds by creditors of the bank.

Subsequent to the giving of the Cronin bond, three bank examinations were made by the national bank examiners acting under the Comptroller of the Currency. The first examination was on October 6–7, 1930. The Cronin bond was examined, and the examiner concluded that the Cronin loan was not slow, doubtful or a loss (these being the three classifications for undesirable paper) and so reported.

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The second examination was conducted February 21–March 3, 1931. The Cronin and Westchester bonds were examined, and the examiner concluded that these two loans were not slow, doubtful or a loss and so reported. The third examination was conducted August 20–September 5, 1931. All four bonds were examined and the loans were not criticized in the report with the exception of the Stone

loan which was classified as "slow" because it appeared that the Bank might not be paid until the bond expired. In the course of this examination, the examiner talked with Cliff and was assured that the bonds were all right; he also checked the authority of the Surety Company to do business in Massachusetts and Cliff's qualification as agent, and found both satisfactory.

If these loans had not been secured by surety bonds believed to be valid the major portion of the Cronin and Stone loans would have been classified as "loss" and the balance "doubtful"; the Robinson and Westchester loans would have been classified temporarily as "doubtful", and at least the Robinson loan ultimately as "loss". The national bank examiners were deceived by the bonds and reasonably believed that they secured the notes. While a careful textual examination of the Westchester bond would have raised at least a doubt as to whether it secured the $40,000 Westchester note, I do not find that the failure to discover this circumstance was negligent or unreasonable. The reports of these examinations were prepared in quintuplicate and distributed to the bank, the Comptroller of the Currency, the Federal Reserve Bank, the chief examiner of the district, and the examiner.

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The examination of February 21–March 3, 1931, disclosed a capital impairment of $43,000 due to a depreciation of $215,000 in the value of bonds held as investments. The bank's capital was $1,000,000. The Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. sec. 55. Upon representations that the money was being raised the time for remedying the impairment was extended to July 1, 1931.

On June 29, 1931, J. Dudley Clark put $300,000 into the bank. See the decision of Judge Brewster in *Clark* v. *Boston-Continental National Bank*, 9 F. Supp. 81. (It should be observed that the date at the end of the paragraph numbered (1) on 9 F. Supp. 83, should be 1931, not 1930.) This case holds that Clark is a general creditor of the bank. Since the hearings before me commenced, a judgment for the plaintiff has been entered in this case; and $81,250 has been

paid to Clark by the receiver in satisfaction of that judgment, the amount representing the balance due to Clark on the basis of the estimated dividend upon his claim and the set-off arising out of Clark's stockholder's liability.

The motivation of J. Dudley Clark's action in putting $300,000 into this bank was complex. The matter was first broached to him by a customer of his brokerage firm, and there is no question that his interest was stimulated by the fact that he was a stockholder to the extent of $18,000, and that several of his customers were heavily committed. It was suggested to him that an investment in this bank would cause him to acquire customers, and this proved to be the fact.

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A connection at the bank furnished the chance of a favorable opening for his son. But I find that these factors went no further than to cause Clark to investigate the proposition and to predispose him in its favor if investigation should show that an investment in the bank would be sound. This investigation proceeded upon several lines:

1. He directed his son, Forrester, to go over the affairs of the bank in detail. Forrester went over the loan cards individually with Ragan and was told by Ragan that the Cronin, Westchester and Stone loans were secured by surety bonds, not naming the company. Forrester did not see the bonds; but I find that the existence of the bonds and their availability for inspection by Forrester made it possible for Ragan to state with impunity that they existed and that that statement would not have been made if the bonds had not existed. Forrester reported to Clark that he had gone over the loans with Ragan and that these three loans were secured by surety bonds. From these facts I conclude and find that Clark indirectly relied upon the Cronin, Stone and Westchester bonds.

2. He was told by Ragan that the bank examiners and the Comptroller of the Currency required that $300,000 be put into the bank to remedy a deficiency in the bond account and that, with that con-

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tribution, the bank would be allowed to continue in business. This was true. Before the money was finally put in, the Comptroller of the Currency approved the contract between the bank and Clark, and

Clark was officially notified to that effect. He understood that the bank had been inspected by the national bank examiners and that it was as a consequence of that inspection that the Comptroller had imposed a requirement that $300,000 be contributed—and had imposed no further requirement. This was true. Clark relied upon this fact. I find that the Comptroller relied directly upon the examiners' having seen the Surety Company bonds; that he would have imposed further requirements if it had been known that the Cronin and Westchester loans were unsecured; that Clark relied upon the willingness of the Comptroller to allow the bank to continue in business upon contribution of $300,000 as an indication that the condition of the bank was otherwise sufficient for continuance of business; and that Clark therefore indirectly relied upon the existence of the Cronin and Westchester bonds.

3. Clark examined the last published statement of the bank, and relied upon its contents. There is no sufficient evidence before me to enable me to find whether or not that statement would have been

different if it had been known that the Cronin and Westchester loans were unsecured. Clark did not see a copy of the report of the examiners; but he tried to get it and received from Ragan an explanation, satisfactory to Clark, why it was not available. Clark desired an independent audit of the bank, but was informed that the time allowed by the Comptroller for remedying the capital impairment was too short to permit such an audit to be made. It may thus be said that accurate and complete accounting information was sought but not obtained.

4. Clark had extended talks with Ragan, and relied greatly upon them. He had tremendous confidence in Ragan's integrity and judgment. He discussed some loans with Ragan and accepted Ragan's statements that the borrowers were known to him and were good. Under the circumstances he would have taken Ragan's word as to the validity of any loan. But the circumstances in which Clark's mind was working included two factors in which the existence of the bonds had induced unjustifiably optimistic reports (Forrester's statements and the Comptroller's attitude) and a third in which they may

have had some effect (the published statements). And there are limits to credulity. One loan might have been approved on Ragan's

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unsupported statement, but not three totalling $112,000. It is plain from Clark's other activities that his reliance upon Ragan was not total or exclusive.

5. Clark talked with the attorney for the bank, and several stockholders and directors. In part he relied upon their statements.

I find that the information received from Forrester and the inference of soundness drawn from the Comptroller's action were both substantial factors in inducing Clark to put in this money. I find that the existence of the Cronin, Stone and Westchester bonds induced Forrester's statements and that the Cronin and Westchester bonds induced the Comptroller's action. And I therefore conclude and find that Clark relied upon the existence of these bonds in investing $300,000 in the bank.

On three occasions, namely April 3, 1931, July 10, 1931, and October 14, 1931, the cashier of the bank published in the Boston Transcript a statement of condition of the bank, given pursuant to a call from the Comptroller of the Currency. Publication of the statement given in response to the call is required by law. 12 U. S. C. sec. 161. Each statement contained a single figure showing the amount of "loans and discounts". In each of these figures the amounts of such of the Cronin, Westchester, Stone and Robinson notes as were at the time outstanding were carried at face value. There was no division between secured and unsecured loans. There is no evidence sufficient to enable me to find whether or not these published statements would have been in any different form if the surety bonds had not existed. No evidence was offered that any

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depositor or other creditor saw or relied upon these published statements. I therefore do not find that any creditor relied upon the published statements of condition.

On the other hand it is perfectly clear that the Comptroller of the Currency and the national bank examiners relied upon these bonds as valid obligations of the Surety Company to the extent that the

bonds were outstanding at the time of each of the three examinations. I infer from the history of the relations between this bank and the Comptroller and his examiners, that knowledge of the uncollectibility of some $120,000 of its loans (over 10 percent of its capital) would have been the occasion for whatever vigorous action for the protection of old depositors and the prevention of loss to potential new depositors the Comptroller could take. And the powers of the Comptroller are substantial. He can appoint a receiver for a national bank if he finds its capital impaired and the impairment is not remedied within three months of notice given (12 U. S. C. sec. 55).

He may also appoint a receiver if he "shall become satisfied of the insolvency" of the bank (12 U. S. C. sec. 191); and the jurisdictional fact authorizing receivership is not the actual insolvency of the bank but the Comptroller's opinion that it is insolvent. *U. S. National Bank of La Grande* v. *Pole*, 2 F. Supp. 153, 159 (D. Ore.). Even prior to the Act of June 16, 1933, c. 89, sec. 28 (a) (b), the Comptroller and his examiners made a practice of recommending improvements in the condition of banks and exerting pressure to see that they were carried out. Heinberg, the office of the Comp-

troller of the Currency (1926), page 25. For an example of such pressure, see *Rankin* v. *City National Bank*, 208 U. S. 541, 542. I find that the failure of the Comptroller of the Currency to exercise his legal and practical authority to require the actual infirmities in the loans here in question to be corrected was in reliance on the supposed validity of the bonds now in suit. Subsequent to the bank examination of August–September, 1931, new deposits were made in the bank in an amount exceeding $300,000. The depositors of these sums are still creditors of the bank in an amount exceeding the face value of the bonds.

Whether the sequence of events stated in the preceding paragraph should produce a finding that depositors subsequent to the August–September examination relied upon the bonds is, I take it, mainly a question of law. I rule that these facts justify a conclusion that the depositors did so rely; and I draw that conclusion. It

is the function of the Comptroller of the Currency and national bank examiners to protect the depositing public by making the examinations and imposing the requirements which an individual depositor cannot make or impose, legally or practically. *Third National Bank* v. *Reichert,* 101 Mo. App. 242, 252. Documents upon which the examiners directly rely are, *ipso facto,* indirectly relied upon by the depositing public. See *Murphy* v. *Gumaer,* 18 Colo. App. 183, 190. If it be said that the depositors did not rely on the bonds, that the Comptroller is in no strict sense the agent of the depositors, and that the finding of reliance is thus to some degree fictional, the proposition may be restated as follows: Since the Comptroller and

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the examiners are constituted by law as an authority to take for depositors collectively the protective measures which they cannot individually take for themselves, a reliance by the Comptroller and examiners should have the same legal consequences as a direct reliance by the depositors.

It would not, I think, accord with common sense to conclude that the existence of $120,000 of surety bonds as collateral for paper which was otherwise nearly valueless had no effect upon the action of creditors of the bank. The complexities of the bank's internal organization and external relationships make it extremely difficult to trace the precise channel through which the existence of the bonds induced reliance by creditors. But in my opinion this influence has been sufficiently traced in the case of Clark and of depositors. My attitude toward this question of fact is influenced to some extent by the circumstance that the proof of reliance in this case seems more direct than in other reported cases involving the same problem. See authorities cited under ruling number 4.

As of December 31, 1934, the bank owed over $3,000,000 to general creditors including Clark and the depositors above referred to, and the fair value of its assets available for paying these creditors was $170,000. I find that if the bonds here in suit are collected in full with interest, creditors will not receive full payment.

LIABILITY OF THE SURETY COMPANY APART FROM NOTICE OF LOSS AND ELECTION OF REMEDY.

RULINGS OF LAW.

1. I rule that the contracts here in suit are Massachusetts contracts. The issues of law involved in these cases are part of that "general jurisprudence" as to which, within the decision of *Swift* v.

Tyson, 16 Pet. 1, federal courts are not bound by the judge-made law of any particular state. *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 558, 559; *Niagara Fire Ins. Co.* v. *Pospisil*, 59 F. (2d) 709 (8th C. C. A.); *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495. Massachusetts statutes are conclusive so far as applicable.

2. I rule that the bonds and "endorsements" in suit are binding obligations of the Surety Company in spite of the limitations on Cliff's authority contained in the "Letter of Instructions" and in spite of the fact that the bonds were written without premium, unless Ragan's knowledge of these infirmities binds the receiver.

It is unquestioned that the writing of bonds of this type was within the published authority of Cliff as set forth in his power of attorney attached to the Cronin and Westchester bonds. It is equally unquestioned that Ragan knew of circumstances which put the writing of these particular bonds beyond the authority of Cliff, and that no other person connected with the bank had this knowledge. The validity of the bonds thus becomes a matter of determining who is bound by Ragan's knowledge.

The same is true as to the "endorsements". Counsel for the Surety Company make the point that, while the bonds are under seal, the endorsements are not and that the absence of actual consideration for them is a fatal defect. It is true that no premium was paid for these extensions of the bond obligations. But benefit to the promisor is not of the essence of consideration. Detriment to the promisee is equally effective. In these cases the bank forebore from suing on the bonds and permitted the note obligations to be renewed; and this is a sufficient *quid pro quo* to support the endorsements as contracts.

3. I rule that the bonds and "endorsements" in suit were not bind-

ing obligations in the hands of the bank as a going concern, for the

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reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and "endorsement" would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors.

The general rule is that knowledge of an agent acquired in the course of conducting his principal's business is imputed to the principal. An exception exists where the agent is engaged, alone or with others, in a scheme to defraud the principal, the reason being either that the usual presumption that the agent will disclose his knowledge to the principal is without foundation where the agent is acting adversely (*Gunster* v. *Scranton etc. Co.*, 181 Pa. 327), or that the agent under these circumstances is not in any true sense acting in the course of his employment (*Henry* v. *Allen*, 151 N. Y. 1). See 2 Mechem, Agency (2d ed.), secs. 1816, 1817; Seavey, Notice Through an Agent, 65 U. of Pa. L. Rev. 1, 16, 17. But, regardless of the agent's fraud, if the principal asserts a title to property or claim under a contract procured by the act of the fraudulent agent, the principal in this assertion becomes charged with the agent's knowledge.

Traditional metaphors apart, the reason appears to be that the principal, in asserting the title or contract right procured by the agent, ratifies the act of procurement and thus remedies the original defect in the principal-agent relationship. Where the principal must trace his title to the property or chose in action through the act of the fraudulent agent he is bound by knowledge of the agent acquired in doing the act. This rule is well settled in the general jurisprudence of this country. *Curtis, Collins & Holbrook Co.* v. *United States*, 262 U. S. 209, 222, 223; *Tremont Trust Co.* v. *Noyes*, 246 Mass.

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197, 207; *First National Bank* v. *Burns*, 88 Ohio St., 434; *Brownell* v. *Ruwe*, 220 N. W. 588 (Neb.); 2 Mechem, Agency (2d ed.) secs. 1817, 1818; Restatement of Agency, sec. 274, particularly comment b; same, sec. 282 (2c).

Plainly the rule just stated can have no application if the principal

is not in fact compelled to trace his title through the act of the fraudulent agent but can rely upon representation by some other agent who was innocent of the fraud or guilty knowledge. *National Bank of Grafton* v. *Babbidge,* 160 Mass. 163; *Broadway National Bank* v. *Heffernan,* 220 Mass. 247. It is strongly urged by counsel for the Bank that Ragan was not its sole representative in the transactions by which these bonds were obtained but that O'Donnell was its agent in taking the bonds and making the loans and that the discount committee represented it with reference to extension or renewal notes. This position does not seem to me tenable.

O'Donnell had no executive authority. He was a ministerial officer taking orders from his superior who, in this case, was Ragan. He had no discretion to make a loan without directions from above or to decline to discount a note presented to him by Ragan. Unquestionably the Cronin transaction had to be participated in by several clerks, bookkeepers and tellers before Cronin actually got his money; but this does not obscure the fact that Ragan was the sole person representing the Bank in obtaining the Cronin bond within the reason of the rule of law here being considered. The discount committee had no part in the business until some considerable time after each

of these bonds had been procured and deposited in the collateral portfolios of the bank. Precisely similar contentions as to a like employee and investment committee were made and rejected in *Tremont Trust Co.* v. *Noyes,* 246 Mass 197, 208.

Certain cases cited for the receiver are distinguishable. In *National Bank of Grafton* v. *Babbidge,* 160 Mass. 163, the innocent cashier was held to be the sole representative of the bank in discounting a note at the request of the president, where the proceeds of the note were deposited by the cashier to the president's account. The case is distinguishable on the ground that it was apparent on the face of the transaction that the loan was for the benefit of the president and that he was on the opposite side of the transaction from the bank; if the bank was represented at all in the transaction it was by the cashier. See 2 Mechem, Agency (2d ed.) sec. 1817, citing the Babbidge case at n. 82. *Broadway National Bank* v. *Heffernan,* 220

Mass. 247, is one in which the loan was granted by the authority of the discount committee of the board of directors and not by that of the fraudulent cashier. In the case at bar the loans were granted by Ragan's sole authority. In *Cooper* v. *Gilbert,* 40 F. (2d) 260 (10th C. C. A.) and *Tanners National Bank* v. *Dean,* 283 Mass. 151, the person being sued by the bank himself colluded with the fraudulent officer to deceive the bank. To whatever extent these cases are inconsistent with the principle here stated, they fail to correspond to the weight of reasoned authority.

Indian Head National Bank v. *Clark,* 166 Mass. 27, is squarely

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opposed to the ruling I have made, at least as regards the Westchester and Robinson transactions, in which new money was paid out by the bank upon the delivery of a bond. In that case a note was discounted by the bank, whose sole agent in the transaction was its cashier. The note had been signed without consideration by its makers, and the cashier knew this fact. The note was discounted by the cashier as part of a scheme to defraud the bank and he appropriated the proceeds of the note. It was held that the bank could recover upon the note and that the knowledge of the cashier was not imputable to it.

The opinion of Mr. Justice Barker states that there are two independent exceptions to the usual rule that notice to the agent is attributed to the principal: (a) where the agent is for the moment an adverse party and the principal is represented by other agents, the knowledge of the agent is not imputed; (b) where the agent, though he be the sole agent, is at the same time committing an independent fraudulent act upon his own account, his knowledge is not imputed. I am convinced that in situations where, as in *Indian Head National Bank* v. *Clark,* the principal is suing upon the contract obtained by its fraudulent agent acting alone, this decision is out of line with the great weight of authority and has been overruled *sub silentio* in the Massachusetts Supreme Judicial Court. The case is indistinguishable from *Tremont Trust Co.* v. *Noyes,* 246 Mass. 197, and I take the following language of Rugg, C. J. (at 207), as denying the principle enunciated in the Clark case:

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"Where the assets of the principal are by the hand of the treacherous agent in execution of the fraud exchanged for the new security, be it note or other thing of value, then the knowledge of the agent is imputed to the principal. If the faithless officer acts alone in discounting a note and misappropriating the proceeds, then the bank is bound by his knowledge of the circumstances under which he had obtained it from the defendants."

The cryptic and somewhat contradictory remarks in *Chapple* v. *Merchants National Bank,* 284 Mass. 122 at 138 and 139, do not seem sufficient to resurrect the rule thus definitively interred.

4. I rule that the bonds and "endorsements" in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors.

In the first place it seems perfectly clear that if the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover upon the bonds, regardless of absence of premium and of the existence of an agreement that the bonds were not to be enforceable obligations. The foreseeable reliance upon these bonds of bank examiners and creditors would estop the Surety Company to deny the representations of enforceability explicit in the terms of the instruments. The cases establish that the receiver as the representative of creditors may assert the estoppel *in pais* thus arising. *Lyons* v. *Benney,* 230 Pa. 117 (national bank); *Murphy* v. *Gumaer,* 18 Colo. App. 183 (national bank); *Skordal* v. *Stanton,* 89 Minn. 511 (state bank); *Shaw* v. *Borchers,* 46 S. W. (2d) 967 (Tex.;

state bank). See also *Hurd* v. *Kelly,* 78 N. Y. 588; *Ashley* v. *Rowe,* 101 Fla. 110. The rationale of these cases is stated in *Lyons* v. *Benney,* 230 Pa. 117, 119–120, as follows:

"When an act has been done in fraud of the rights of the creditors of the insolvent corporation the receiver may sue for their benefit, even though the defense set up might be valid against the corporation itself. In such a case he may maintain an action

which the corporation itself could not . . . This appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for their benefit."

And again in *Murphy* v. *Gumaer,* 18 Colo. App. 183, 190–191:

"The defendant was instrumental in clothing the bank with such an appearance of genuine assets as induced the comptroller to regard it as sound and to suffer it to continue in business. In the reports which were transmitted to him, these notes figured as resources; and the public had a right to rely on the reports when they were published. If the defendant was not liable on the notes, the comptroller was deceived, and the persons who dealt with the bank and intrusted it with their money were also deceived. However valid the defense might be if the bank were plaintiff, the defendant, who, when he gave the notes, knew exactly the purpose for which they were to be used, is estopped to say, as against the creditors, that they were other than what, on their faces, they purported to be, or that the appearance which was given to the books was not genuine."

This is only one of several situations in which a receiver, as representative of creditors, can maintain actions which the corporation as a going concern could not have maintained. Avoidance of fraudulent conveyances and of unrecorded chattel mortgages comprise the most familiar examples.

Counsel for the Surety Company insist that *Rankin, Receiver of Captiol National Bank of Guthrie,* v. *City National Bank,* 208 U. S.

541, 546, is a holding, contrary to the principle stated in the preceding paragraph, that the receiver could not recover even if the Surety Company's authorized officers had participated in Cliff's scheme. I do not so understand it. In that case the bank examiner objected to $30,000 of loans in the Guthrie Bank. To remedy this situation Billingsley, president of the Guthrie Bank, induced the City Bank to

take Billingsley's note for $30,000 and to credit the Guthrie Bank with that amount on the books of the City Bank, agreeing that the credit in the City Bank would not be subject to withdrawal and could be applied against the note at any time. The Guthrie Bank was thus enabled to enter the credit for $30,000 on its books and give to its balance sheet an appearance of prosperity that was fictitious to the extent of $30,000. Before the Guthrie Bank failed the note was charged against the credit and the transaction cancelled in accordance with the arrangement. The receiver of the Guthrie Bank sued to recover the deposit. The Supreme Court of the United States, affirming both lower courts, held that the receiver could not recover.

In the course of a six-page opinion Mr. Justice Holmes adverts to the receiver's status only once by saying (p. 546): "The receiver stands no better than the bank." This is the only reference to any possibility that the receiver might derive rights through creditors that he did not derive from the bank; and it raises the suspicion that no such contention was made. An examination of the record and briefs discloses that, in truth, this problem was not raised either as a matter

of fact by the evidence or of law by the briefs. The case arose in the Western District of Missouri. Although it is one in which proof and argument might unquestionably have been directed to establishing the receiver in a better position than that of the bank, this was not done. The record shows no evidence that the bank examiner was in fact deceived; that any creditor relied on the situation created; that any person became a creditor of the bank after the transaction referred to; or that creditors would not be paid in full. The opinion of the Circuit Court of Appeals treats the problem solely as a question whether the Guthrie Bank as a going concern could have recovered against the City Bank, decides that it could not and adds: "Neither can the receiver, who takes only the rights of the bank, now do so." *Cherry* v. *City National Bank*, 144 Fed. 587, 591. Certain events subsequent to the original transaction were relied upon by counsel for the receiver as strengthening his position (144 Fed. at 593); but nothing was said about reliance or change of position by creditors or the bank examiners. The briefs in the Supreme Court

have been examined and show no reliance upon the status of the receiver as the representative of creditors.

Other cases cited for the Surety Company rest wholly upon *Rankin* v. *City National Bank,* 208 U. S. 541, *supra,* and are distinguishable upon the same ground. *Cutler* v. *Fry,* 240 Fed. 238, is a case from the District of Kansas in which there is no evidence that creditors or the bank examiners relied upon the fictitious asset. The court relied wholly upon the Rankin case. In *Andresen* v. *Kaercher,* 38 Fed.

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(2d) 462 (8th C. C. A.), there is again no evidence of reliance by creditors or the bank examiners upon the accommodation notes; indeed, quite to the contrary, the companion case of *Kaercher* v. *Citizens' National Bank,* 57 F. (2d) 58 (8th C. C. A.), discloses that the agreement that the note-makers would be held harmless, executed by the president and cashier of the bank apparently upon full authority, was "in the bank when a receiver was appointed". 57 F. (2d) at 58. The court again relied upon the Rankin case and the group of cases in 240 Fed. involving the Yates Center National Bank, of which *Cutler* v. *Fry, supra,* is one.

If, then, the Surety Company by authorized agents had done what Cliff did, it would be liable. Does it follow that the company is liable under the circumstances actually existing in this case? Conscious deception on the part of the principal is lacking; but in place of it there is substituted (a) conscious deception on the part of the agent and (b) the fact that the principal gave to the agent for its own purposes and profit such indicia of authority to act on its behalf as enabled the agent to make the deception effective. I am convinced that the company should be equally responsible under these conditions. It provided Cliff with a power of attorney in terms much broader than he was expected to exercise, copies of the same to exhibit to third persons and to attach to documents, a corporate seal and corporate stationery. It did these things because it found that this was the convenient and profitable way in which to conduct its business. Anyone can see that such a procedure invites misuse of

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the equipment thus provided. The question is, Upon whom is to be placed the risk of loss of such misuse? It seems to me clear that the risk of loss must fall upon the principal who created it. The Surety Company is estopped to deny that the bonds and "endorsements" are the effective instruments which they appeared to be. Ragan's knowledge of the circumstances under which they were obtained does not affect the receiver as the representative of the creditors.

Direct authority in the class of cases here involved is lacking, but a fairly persuasive analogy exists. It appears to be settled that a principal is liable in tort for frauds committed by an agent on his own account, where the fraud has been made possible by the fact that the principal has put the agent in a position which facilitated the consummation of the fraud. In the typical case the agent of a telegraph company sends a message over the wires to the plaintiff; the message purports to come from some person having business relations with the plaintiff and requests that money be sent; the money is sent and the fraudulent agent in some manner intercepts it. The plaintiff is granted recovery from the telegraph company. *Bank of Palo Alto* v. *Pacific Postal Tel. Cable Co.,* 103 Fed. 841 (D. Cal.); *McCord* v. *Western Union Tel. Co.,* 39 Minn. 181. Compare *Birkett* v. *Postal Tel. Co.,* 107 App. Div. 115. For a case in which a bank officer utilized his position for consummation of a private fraud, thus rendering the bank liable, see *Steward* v. *Wright,* 147 Fed. 321 (8th C. C. A.). The Agency Restatement deals with these cases as follows:

"Sec. 261: A principal who puts an agent in a position that

enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

"Sec. 262: A person who otherwise would be liable to another for the misrepresentation of one acting for him, under the rule stated in sec. 261, is not relieved from liability by the fact that the apparent agent acts entirely for his own purposes, unless the other has notice of this."

The comment under Section 261 emphasizes the applicability of this rule:

> "The principal is subject to liability under the rule stated in this Section although he is entirely innocent, although he has received no benefit from the transaction, and, as stated in sec. 262, although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud. . . ."

See also 2 Mechem, Agency (2d ed.), sec. 1984.

Counsel for the Surety Company insist that this is a case in which two innocent principals (the bank and the Surety Company) have been equally imposed upon by faithless agents, that neither is more to blame than the other, and that the loss should lie where it falls. As between the bank and the Surety Company there is force in this argument; and I have ruled, upon somewhat different grounds, that the bank would not have been able to recover. But with reference to Clark, the bank examiners and subsequent depositors, the situation is substantially different. These persons are the victims of the joint fraud of Ragan and Cliff. If the Surety Company is otherwise liable because of having placed in Cliff's hands the means of consummating

this fraud, it cannot escape liability by establishing that the deception was also the work in part of the bank through Ragan. The fact that the wrong was joint does not relieve either wrongdoer.

Ruling number 4 is not inconsistent with anything explicit or implicit in Judge Brewster's decision in *Clark* v. *Boston-Continental National Bank,* 9 F. Supp. 81. As I understand the opinion there are three distinct bases upon which Clark is held to be a general creditor:

(a) that the contract between Clark and the bank provided that in the event of liquidation he should be entitled to priority over the stockholders;

(b) that the bank had failed to carry out its obligations as to deposit of 40 percent of its stock in a voting trust and that the contract provided that in event of such failure Clark was entitled to the return of his $300,000;

(c) that, due to misrepresentations by Ragan that the notes of Cronin, Westchester Corporation and Stone were secured by surety bonds and due to other misrepresentations concerning the bank's assets, Clark was entitled to rescind.

Plainly none of these grounds of decision except the last is relevant to the present case. It seems to me implicit in Judge Brewster's decision that the bonds here in suit were not enforceable in the hands of the bank; and I have so ruled (ruling number 3). But it does not follow either from Judge Brewster's decision or from my ruling number 3 that they are not enforceable by the receiver. The statement in the summarization of facts that "by secret agreement [Ragan] had released the surety company from all obligations on the bond" (9 F.

Supp. at 83) is surely not binding in the present litigation and may indicate that Judge Brewster's opinion as to the validity of these bonds in the hands of the bank is based upon assumptions which the evidence in the present case does not justify.

5. I rule that the "releases" given by Ragan and the statement that the bonds would not be enforced do not relieve the Surety Company of liability upon the bonds to the receiver.

Ragan had no authority to do these things. *Prudential Trust Co.* v. *Moore,* 245 Mass. 311, 316. It may, for present purposes, be assumed that as against the bank (which, as I have ruled, is bound by Ragan's knowledge) the action of Ragan would prevent any obligation from arising, not because the releases were effective, but because they, with attendant circumstances, indicated that there was no intent on either side to create a binding contract. But see 5 Wigmore, Evidence, sections 2406, 2435. However, it was of the essence of the intended fraud that the bonds and "endorsements" should have the appearance of binding contracts and should be so understood by all persons to whose knowledge these documents should come. As against the creditors, unaffected by Ragan's knowledge, these secret agreements, written and oral, can have no force; and the receiver stands in their shoes.

6. I rule that the Westchester bond dated December 20, 1930,

does not secure payment of the note of $40,000 of Westchester Dis-

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count Corporation dated December 23, 1930; that there is no evidence of any breach of condition with reference to the four notes which it purports to secure, if any such exist; and that there can therefore be no recovery upon this bond.

This ruling is made as a matter of construction of the language of the Westchester bond. It is obvious from the facts found that both Cliff and Ragan intended the bond to secure the Westchester note for $40,000; but the instrument as drawn did not carry out that intention. If the prayer for general relief in the receiver's answer can be taken to encompass a prayer for reformation, I rule that, apart from other difficulties, the equitable basis for reformation is absent and that the instrument cannot be reformed. No consideration was in fact given for the instrument and neither the bank directors, the bank examiners nor creditors could have relied upon anything except the terms of the instrument which lay in the bank's vaults.

7. I rule that the new notes given by Cronin and Robinson upon and after the maturity of existing notes were "extensions" and "extensions or renewals" of the original Cronin and Robinson notes within the meaning of the Cronin and Robinson bonds and endorsements.

If the transactions which here took place upon the maturity of the original notes did not constitute renewals and extensions it would be difficult to imagine what type of transaction would come within those terms. Even if the bonds contained no guarantee of renewal notes, the bank would still be protected on the theory that the acceptance

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of a renewal note did not constitute payment of a maturing note where the maturing note was secured. Where it is to the interest of the creditor to keep the old obligation alive for the purpose of preserving his security, it will be presumed that he so intended. *Dodge* v. *Emerson,* 131 Mass. 467; *Cotton* v. *Atlas National Bank,* 145 Mass. 43, 45.

8. I rule that Stone's present obligation to the bank and the receiver is the "obligation in the sum of $52,000" referred to in the

Stone bond, and that the obligation referred to in the Stone bond has not been paid or discharged by any new notes which Stone gave to the bank as other notes matured.

Unlike the Cronin and Robinson bonds which secure certain notes and their extensions and renewals, the Stone bond secures an "obligation in the sum of $52,000". Since I have found as a fact that there was no intention to pay off this obligation by the giving of renewal notes, it follows that the obligation still continues and is secured by the bond.

NOTICE OF DEFAULT: WHETHER A CONDITION PRECEDENT TO RECOVERY.

9. I rule that the giving of notice of default within ten days was not a condition precedent to recovery under any of these bonds and that, there being no evidence of damage to the company from such delay as may have existed, the company has no defense based upon the requirement of notice.

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Each of the four bonds contains a provision for the giving of notice of default within ten days to the home office of the Surety Company. The question is whether this provision is a condition precedent to the Surety Company's liability or is merely a promise. If it is a condition precedent the bank cannot recover without proving that it has been complied with; if it is a promise, its breach affords no defense to the Surety Company in the absence of evidence of substantial damage—and no such evidence has been offered.

The language of the bonds differs with reference to the giving of notice:

(a) Westchester bond: "In the event of default on the part of the principal on any note, the obligee shall notify the home office of the Surety Company . . . within 10 days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, . . . said payment to be made by the Surety Company within thirty days after maturity of the final note."

(b) Cronin and Robinson bonds: "In the event of default on

the part of the principal, the obligee shall notify the home office of such surety . . . within 10 days, by registered mail, of such default, and the Surety Company shall within 30 days pay any liability hereunder."

(c) Stone bond: "In the event of default on the part of the principal . . . the obligee shall notify the home office of the Surety Company . . . within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, . . . said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default."

The Cronin and Westchester bonds were extended by "endorsements" which provided that:

"In event of default on the part of the principal . . . the obligee

. . . shall notify the home office of this company . . . within five days by registered mail, of such default."

Common forms of insurance policies have been held to make notice a condition precedent to the bringing of an action; but the language of such policies differs substantially from that of the instruments here in suit. Thus in *Fitchburg Savings Bank* v. *Mass. Bonding & Ins. Co.*, 274 Mass. 135, "affirmative proof of loss with full particulars" was required within three months and it was provided that: "Legal proceedings shall not be brought prior to the expiration of three months from the furnishing of such proof." No proof of loss "with full particulars" was ever given. The court held that the giving of such proof was a condition precedent to recovery. Again in *McCord* v. *Masonic Casualty Co.*, 201 Mass. 473, the policy provided that: "Unless notice shall be given within two weeks, all claim under this certificate shall be forfeited." In *McCarthy* v. *Rendle*, 230 Mass. 35, the policy provided that: "This agreement is subject to the following conditions: . . . D—The assured upon the occurrence of an accident shall give immediate written notice thereof to the Company." In *Smith* v. *Haverhill Mutual Fire Ins. Co.*, 1 Allen, 297, the company's by-laws which were held to be incorporated into

the policy provided that: "Unless such proofs . . . shall be produced within said thirty days, . . . the losses shall not be payable." In *Eastern R. R. Co.* v. *Relief Fire Ins. Co.*, 98 Mass. 420, the company promised to pay the loss "within sixty days after due notice and

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proof thereof made by the insured in conformity to the conditions annexed to this policy", one of which "conditions of insurance" required notice forthwith and proof of loss within sixty days.

These are the authorities relied upon by the Surety Company in requesting a ruling that the giving of notice within the specified time was a condition precedent to recovery upon these bonds. The instruments in those cases seem to me distinguishable from those in the case at bar in their uniform insistence upon satisfaction of the requirement of notice as a prerequisite to the bringing of suit. There are numerous cases in which it is pointed out that a requirement of notice is merely promissory unless it is expressly made a condition or ground of forfeiture. *New Amsterdam Casualty Co.* v. *United States Shipping Board*, 16 F. (2d) 847 (4th C. C. A.); *Coventry Mutual Live Stock Ins. Assn.* v. *Evans*, 102 Pa. St. 281; *Mason* v. *St. Paul Fire & Marine Ins. Co.*, 82 Minn. 336, 338; *Kahnweiler* v. *Phoenix Ins. Co.*, 57 Fed. 562 (*D. Kan.*); *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wis. 112. See also 2 Williston, Contracts, sec. 665; 5 Joyce, Insurance (2d ed.), sec. 3282.

I am unable to find in these four bonds language which can fairly be construed as creating a condition. The Westchester bond is the most favorable to the bank, since there is no connection at all between the giving of notice and the payment by the company; payment is due "thirty days after maturity of the final note". The Cronin and Robinson bonds are somewhat ambiguous. The company is obligated to pay "within 30 days", it being somewhat conjectural whether that period is to be computed from the date of default (as

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in the Westchester bond) or the date of notice (as in the Stone bond). Probably the latter construction is preferable; but no such ambiguous phrase should be treated as raising a condition whose slightest breach would invalidate the obligation. The Stone bond is

the most favorable to the company. It provides that payment is to be made within thirty days of the receipt "of the notice of default". Even this, however, is insufficient to cause the requirement of notice to be treated as a condition. A delay in giving notice would operate to postpone the maturity of the company's obligation until thirty days after the notice was received, but it would not discharge the obligation in the absence of proof that the delay had been substantially harmful to the company. See *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wis. 112, 118. Nothing in the wording of the "endorsements" to the Cronin and Westchester bonds has any tendency to strengthen the inference that notice was a condition precedent to recovery.

NOTICE OF DEFAULT: WHETHER IT WAS GIVEN AS REQUIRED.

I have been requested to make findings and rulings as to whether notice of default was given within the meaning of the bonds. Once again, the bonds must be treated separately because of differences in their terms.

a. The Cronin Bond.

10. I find and rule that the bank gave notice of default to the Surety Company as required by the Cronin bond.

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This bond was dated September 6, 1930, and was given with reference to a note of Cronin maturing September 22, 1930. For present purposes the significant language of the bond is the following:

> "The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make . . . full and true payment of note, . . . or of any extension thereof, in whole or in part, then this obligation shall be void. . . . In the event of default on the part of the principal, the obligee shall notify the Home office of such Surety . . . within ten days, by registered mail, of such default, and the Surety Company shall within thirty days pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default six months from date hereof . . ."

The syntax of these sentences leaves much to be desired but does not entirely preclude analysis. What is the "default" of which the Surety is entitled to notice? Is it the failure to pay the existing note at its maturity two weeks and two days after the bond was written? Or is it the failure to meet this obligation "within six months"? Plainly the latter. The words "default six months from date hereof" in the last line of the quoted excerpt appear to define "default" as it appears in the earlier portion of the bond. Any other construction would cause the provisions for notice and payment to accelerate substantially the obligation of the bond: for if Cronin failed to pay on September 22, 1930, and notice of default were then given, payment by the Surety within 30 days of the notice is required, although the condition of the bond is only that Cronin shall pay within six months

from September 6, 1930. The instrument anticipates that Cronin will not pay on September 22, and that the note may be renewed, extended, or allowed to remain overdue. *Lascelles* v. *Clark,* 204 Mass. 362, 373, and *Chace* v. *Brooks,* 5 Cush. 43, 50, cited by counsel for the Surety Company deal with situations in which the surety was bound only upon the original obligation and not upon extensions or renewals, and are inapplicable here.

Cliff executed three "endorsements" successively extending the Cronin bond. They are identical in form. Treated as one extension, they provided that:

> "Note Guarantee Bond . . . binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22, 1931, is hereby extended in an amount not to exceed $14,000 or such portion thereof, as may remain unpaid on date of November 3, 1932.
>
> "In event of default on the part of the Principal, . . . the obligee . . . shall notify the Home Office of this Company . . . within five days by registered mail of such default."

I rule that these are amendments to the original contract of suretyship and hence new contracts executed by Cliff and that they fall

within the terms of his authority as stated in his power of attorney. I further rule that the word "default" in the suretyship contract as thus amended means the failure of Cronin to pay, on November 3, 1932, the full amount due upon the original note of $20,000 or any renewal or extension thereof.

It is undisputed that the company was notified within five days of November 3, 1932, by registered mail that Cronin had defaulted in payment in the amount of $14,000 and interest. I rule that this com-

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plied with the requirement of notice. It is equally undisputed that when Cronin's original note fell due on September 22, 1930, he gave a new note for $18,500 maturing October 22, 1930, paid the bank $1,500 in cash in addition to the discount on the new note, and received back the old note stamped "Cancelled"; that this process of giving a new note and receiving back the old note was repeated several times; that sometimes a cash payment was made in addition to the discount and that sometimes it was not; that sometimes there was an interval between the maturity of the old note and the making of the new, the longest such interval being sixty-three days; that the last note given matured on January 4, 1932; and that no notice of default was sent to the Surety Company until November 4, 1932. But I rule that these facts do not show non-compliance with the requirement of notice of default in the bond as amended by the endorsements.

b. The Westchester Bond.

I have already ruled that the Westchester bond and "endorsements" cannot be construed as a guaranty of the only note the Westchester Discount Corporation made in favor of the bank, and that this bond cannot be the basis of any liability of the Surety Company to the receiver. If, however, it should finally be determined that this bond and "endorsements" did guarantee the Westchester note for $40,000:

11. I find and rule that the notice of default required by the bond

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as amended by the endorsements was given.

The original Westchester bond did not cover extensions, and required notice within ten days "of default on the part of the principal of any note", the notes having previously been described as maturing on January 20, February 20, March 20 and April 20, 1931. No such notice was given within ten days of default on any of the notes. But I rule that the two endorsements constituted new contracts. Treated together, they "extended the obligation in the amount of $40,000" in connection with a series of notes of Westchester Discount Corporation for a period of eight months "in an amount not to exceed $40,000 or such portion thereof as may remain unpaid on date of December 20th, 1931". It was provided that: "In event of default on the part of the principal . . . the obligee . . . shall notify the home office of this company . . . within five days by registered mail, of such default."

The word "default" in this clause must be read in the light of the fact that at least the second of these "endorsements" was executed at a time when the four notes referred to in the bond and the Westchester note of $40,000 were overdue. Plainly the "default" cannot be a failure to pay at maturity, for this had already occurred. It must mean a failure of the Westchester Discount Corporation to pay off the obligation on or before December 20, 1931. It is undisputed that notice was given within five days by registered mail to the home office of the Surety Company that there was a "default of the Westchester Discount Corporation of Mt. Vernon, New York, to pay their obliga-

tions bonded by your company to the Boston-Continental National Bank in the amount of not to exceed $40,000". I rule that, if the bond and endorsements are construed to guarantee the Westchester note, this notice complied with the requirements of the bond and endorsements.

c. The Stone Bond.

12. I find and rule that the Bank did not give notice of default within the time specified in the Stone bond.

This bond, which was not extended, was conditioned upon payment by Joseph Stone of an obligation of $52,000, within one year

from the date of the bond, which was June 2, 1931. Notice within ten days was required "in the event of default on the part of the principal, one year from this date". Stone did not pay on or before June 2, 1932. No notice was given to the company until on or about June 30, 1932. At that time a notice was given which complied with the requirements of the bond except as to time.

d. The Robinson Bond.

13. I find and rule that the bank did not give notice of default within the time specified in the Robinson bond.

This bond was dated July 8, 1931, and was given with reference to a note of Robinson maturing November 8, 1931. For present purposes the significant language is the following:

> "The condition of this obligation is such that if Gordon A.
>
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>
> Robinson shall, within four months from date hereof, make . . . payment of note . . . maturing November 8th, 1931, or of any extension thereof, in whole or in part, then this obligation shall be void. . . ."

Pausing at this point, one must conclude that the words "within four months from date hereof" can only refer to payment of the original note, not to payment of any extension. Since the original note did not mature until four months from the date of the bond, any extension must necessarily mature at a later date. Hence the condition of the bond is satisfied if Robinson (a) pays the original note within four months, or (b) pays any extension at maturity. The bond continues:

> "In the event of default on the part of the principal, the obligee shall notify the home office of such surety . . . within ten days, by registered mail, of such default and the Surety Company shall, within 30 days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof . . . ; the liability of the surety with respect to any such extension or renewal, in no event to extend beyond date of July 8, 1932."

This language in its entirety does, in my opinion, completely defy interpretation. The difficulty centers upon the words "four months from date hereof". These words are plain nonsense when read in the light of provisions in the succeeding clause and other portions of the instrument which make the bond applicable to extensions and renewals of the original note. Since they are irreconcilable with the balance of the instrument, I rule that they are repugnant and are to be disregarded. The question then is, What is the "default" referred

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to? As in the case of the Cronin bond, it was contemplated that the note might not be paid in cash at maturity but that a new note would be given. But the terms of the instrument do not admit of restricting the meaning of "default" to a failure to pay the balance due on July 8, 1932. Nothing less than this will avail the bank.

Robinson's original note was not paid in cash when it matured on November 8, 1931. At or about that time $1,000 was paid on account, and on November 12, 1931, Robinson gave a new note for $19,000, maturing December 9. This note was not paid and no new note was given. I rule that a "default" occurred, within the meaning of the Robinson bond, not later than December 9, 1931. On July 10, 1932, the bank gave notice to the Surety Company which complied with the requirements of the Robinson bond except as to the time of giving. But I rule that such notice was not given within the time specified in the bond.

The bank has not contended that notice of default was waived by the Surety Company as to any of these bonds, and I find that no waiver occurred.

ELECTION OF REMEDY—FINDINGS OF FACT.

In its amended bills in the equity suits and amended answers in the law actions the Surety Company contends that it is not liable under any of these bonds for the reason that the bank was the holder of certain "Bankers' Blanket Bonds" issued by the Fidelity & Deposit Company of Maryland (hereafter called the F. & D.) insuring

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the bank against loss by the fraud of its officers; that the receiver

filed with the F. & D. notice of claim and proof of claim in which it sought to recover under the Blanket Bonds for the Cronin, Westchester, Stone and Robinson losses on the ground that the Standard Surety bonds were fraudulent and uncollectible; that suit was brought in accordance with said notice and proof of claim and was prosecuted to judgment; that this was an election to treat the Standard Surety bonds as invalid; and that this election prevents the receiver from here taking the inconsistent position that the bonds are valid and thus absolves the Surety Company from liability.

The chronology of revelant events relating to this defense is as follows:

Dec. 17, 1931. The bank closed its doors.

Dec. 22, 1931. Receiver appointed.

Feb. 23, 1932. Surety Company brought in the state courts the four bills in equity now being tried, seeking cancellation of the bonds.

April 28, 1932. Receiver's notice of loss to F. & D.

June 2, 1932. Receiver's proof of loss filed.

June 28, 1932. Receiver's law action vs. Standard Surety Company on Westchester bond entered. (Writ dated June 8, 1932.)

Sept. 13, 1932. Receiver's law actions vs. Surety Company on Stone and Robinson bonds entered. (Writs dated Aug. 11, 1932.)

March 21, 1933. Receiver's law action vs. F. & D. entered. (Writ dated Dec. 21, 1932.)

April 14, 1933. Receiver's answers filed to four bills in equity after removal to federal court.

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June 23, 1933. Receiver filed bill of particulars in action vs. F. & D.

June 26, 1934. Receiver filed notice to admit facts in action vs. F. & D.

July 17, 1934. Receiver filed further bill of particulars in action vs. F. & D.

July–Sept. Hearings before auditor in action vs. F. & D.
Oct. 10, 1934. Agreement for judgment filed in action vs. F. & D. Judgment entered.

The Blanket Bonds upon which the actions against the F. & D. were based appear as Exhibits 1-a and 1-b to the notice to admit facts filed June 26, 1934, in case No. 5498 Law in this court. They are herein incorporated by reference if their precise terms are material. These bonds undertook to insure the bank against, *inter alia* loss through dishonest and criminal acts of employees, the amount of coverage being limited to $50,000 and $150,000 respectively. The limitations and conditions to the insurer's liability are, as would be expected, numerous and complicated.

On April 28, 1932, the receiver sent to the F. & D. a letter containing, so far as here material, the following statements:

"Supplementing my letter dated April 8th, you will please find below a resume setting forth specific irregular transactions which would appear to result in a total loss to my trust aggregating approximately $285,000.

. . . .

2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York purported to be issued to cover loan of this bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount of $40,000, said loan due and

payable April 23, 1931. As a result of fraudulent bond in the amount above stated, my trust stands to lose $40,000. and interest.

"The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

. . . .

4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000. purported to be issued on June 2, 1931, as security on loan to Joseph Stone, personally, in said amount. This bond was invalid and resulted

from the fraudulent conspiracy of T. M. Ragan, President, with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of New York. The amount of the loan is uncollectable, and my trust stands to lose the full amount of $52,000. and interest.

5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000. purported to be executed to secure loan on July 8, 1931 to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff and Gordon A. Robinson, and as a result of the fraud my trust stands to lose $15,000. and interest.

"6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York in the amount of $20,000. as security on loan to Arthur D. Cronin made on August 23, 1930. The fraudulent issuance of this bond was made under the same circumstances as the other bonds except in this case Arthur D. Cronin participated. The amount of the loan is uncollectable and my trust stands to lose the amount of $20,000. and interest. . . .

"If further information is desired kindly let me know.

"These claims are made without prejudice to further claims due to other irregularities which may lead to the filing of proper claims under the bonds written by your company."

The receiver subsequently sent to the F. & D. a proof of claim under oath dated June 2, 1932, which, so far as here material, contained the following:

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"County of Suffolk, ss.

"I, John B. Cunningham, Receiver of the Boston-Continental National Bank make the following statement: . . .

"2. $40,000. fraudulent bond of the Standard Surety & Casualty Company of New York, purported to be issued to cover loan of the Boston-Continental National Bank to the Westchester Discount Corporation of which Joseph Stone was Treasurer, said loan dated December 30, 1930, in the principal amount

of $40,000, due and payable April 23, 1931. As a result of fraudulent bond my trust stands to lose $40,000, and interest. The Westchester Discount Corporation of Mt. Vernon, New York, is now in bankruptcy.

$40,000.00

"4. Fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $52,000, purported to be issued on June 2, 1931, as security on loan of Joseph Stone, personally in said amount. This bond was invalid and resulted from the fraudulent conspiracy of T. M. Ragan, President, with Joseph Stone and Percy G. Cliff, the attorney in fact of Standard Surety & Casualty Company of New York. The amount of loan is uncollectable and my trust stands to lose $52,000, and interest.

$52,000.00

"5. Similar fraudulent bond of the Standard Surety & Casualty Company of New York in the amount of $20,000, purported to be executed to secure loan of July 8, 1931, to Gordon A. Robinson, doing business as the Robinson Engineering Company. The bond was known to be invalid to T. M. Ragan, President, Percy G. Cliff, and Gordon A. Robinson. As a result of the fraud my trust stands to lose $15,000, and interest.

$15,000.00

"6. Fraudulent bond purported to be executed by the Standard Surety & Casualty Company of New York, in the amount of $20,000, as security on loan to Arthur D. Cronin, made on August 23, 1930, and renewed from time to time. The fraudulent issuance of this bond was made under the same circum-

stances as the other bonds except in this case Arthur D. Cronin participated. The amount of this loan is uncollectable, and my trust stands to lose the amount of $20,000, and interest.

$20,000.00

Total $501,385.24

The receiver's amended declaration in the suit against the F. & D. alleged that the Blanket Bonds had been written covering losses by dishonest and criminal acts and that there had been losses as a result of such acts to an amount greater than the limits of the bonds. Bills of particulars filed by the receiver showed that there had been 26 alleged losses, of which those on the transactions involved in the present litigation were four. These four were set forth in the particulars as follows:

Name	Date Loss Suffered.	Date Loss and Dishonesty Discovered.	Amount of Loss.	Date of Notice to Defendant.	Criminal Dishone Act.
Westchester Discount Corporation	Dec. 23/30	Shortly before Mar. 4/32	$39,950, with interest	Mar. 4/32 Apr. 28/32	Loan w intent t defraud insured
Joseph Stone	Apr. 26/30 Mar. 24/31	Shortly before Mar. 4/32	$27,532.37 with interest	Mar. 4/32 Apr. 28/32	"
Gordon A. Robinson	July 8/31	Shortly before Mar. 4/32	$14,000.00 with interest	Mar. 4/32 Apr. 28/32	"
Arthur D. Cronin	Aug. 23/30	Shortly before Mar. 4/32	$14,000.00 with interest	Mar. 4/28 Apr. 28/32	"

There was appended to the bill of particulars a note as follows:

"NOTE 3. In column No. 7 the Plaintiff has attempted to give some of the criminal and/or dishonest acts committed with each loan, but as what constitutes a criminal or dishonest act is a question of law, the plaintiff does not intend to be limited by the characterizations given."

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The receiver, on June 26, 1934, filed a "plaintiff's notice to admit facts", in which the receiver called upon the F. & D. to acknowledge receipt of the proof of claim dated June 2d (which was there set forth in full and contained the paragraphs numbered 2, 4, 5, and 6 above described) and proof of claim dated November 3, 1932, containing the same paragraphs and terminating with an affidavit of the receiver in which it stated:

" . . . that there are no counter claims, of offsets of any nature whatsoever, other than those stated in the above statement, due to said Boston-Continental National Bank."

The body of that proof of claim shows no offset by way of claim against the Surety Company.

The case went to trial before an auditor and was heard for twenty days. Counsel for the receiver called as witnesses Cliff, Cronin and a vice-president of the Surety Company to establish the dishonest manner in which the bonds were written and that the Surety Company had no knowledge of their existence. He introduced the proof of claim of June 2, 1932. During the course of the trial counsel for the receiver in colloquies with the auditor contended both that the loans were fraudulent and that the bonds were fraudulent and did not abandon either position. In the hearings before the auditor many other matters besides those affecting these bonds were dealt with.

Between October 2 and October 10, 1934, conferences were had between counsel for the receiver and counsel for the F. & D. relating to settlement. A settlement of $100,000 was finally arrived at. Counsel for the F. & D. was induced to concede probable liability on

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items totalling $105,000; and counsel for the receiver agreed to accept $100,000. The items of probable liability did not include the Cronin, Westchester, Stone and Robinson transactions or any of them. But it was agreed that the liability of the F. & D., if any, with reference to those transactions should be released. I infer and find that the settlement of $100,000 was given in part upon consideration of release of the F. & D. from claims concerning these four transactions. I also infer and find that part of the pressure which induced counsel for the F. & D. to concede probable liability on $105,000 of claims and settle for $100,000 was the threat of liability with reference to the four transactions here in litigation. I therefore find that the receiver has obtained an advantage against the F. & D. by pressing against that company a claim that it was liable to some extent with reference to these four transactions.

A release was given to the F. & D. and judgment entered against the F. & D. in accordance with the agreement. At the same time there was executed an agreement of compromise declaring that the F. & D. acquired no rights against the Surety Company under these bonds, that the receiver reserved to himself all such rights, and that

no part of the $100,000 was paid to the receiver for the acquisition by the F. & D. of any rights against the Surety Company.

The Surety Company was a re-insurer of the F. & D. with reference to its obligations under the Blanket Bonds. Counsel for the receiver knew of this before the settlement above referred to.

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No evidence was introduced or offered before me sufficient to indicate whether the receiver could have recovered under the Blanket Bonds for the losses suffered in the four transactions here in suit. I therefore find that it has not been established that the F. & D. was liable to the receiver with reference to these transactions.

ELECTION OF REMEDY—RULINGS OF LAW.

14. I rule that there has been no election of remedy which is a defense to the receiver's claims in the present litigation.

It is ordinarily no defense to an action that the plaintiff in other litigation has taken an inconsistent position. If A is damaged by a libellous anonymous letter, he may sue B on the theory that B wrote it and, when the jury has found against him, he may sue C on the theory that C wrote it. A binding election of remedy is made (at least in contract cases) only in those situations where a wronged party has the option to affirm or disaffirm a transaction or to accept or repudiate a title, and definitively exercises the option. The cases cited by counsel for both parties establish this principle. See for example *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Frisch* v. *Wells*, 200 Mass. 429; *Scarf* v. *Jardine*, 7 A. C. 345; *Washburn* v. *Great Western Ins. Co.*, 114 Mass. 175. Only rarely is a right of action against one person lost by election to sue another; the usual case is the assertion of two inconsistent claims against the same person.

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The receiver never disaffirmed these bonds or any obligation of the Surety Company which they may create. He never indicated an intention not to enforce any rights he might have under them. The furthest he went was to make a pessimistic prophecy as to his chances of collection. He did not know whether he could recover upon them—and he will not know until this case has been passed upon in

the highest court to which it can be taken. His conduct amounted to nothing more than bringing suit against both companies potentially liable and, necessarily in ignorance of the ultimate result, making the allegations against each which he believed to be necessary for recovery. By notices and suits he consistently declared his intention of holding both the F. & D. and the Surety Company so far as the contracts permitted. Under the Blanket Bonds, notice and proof of loss had to be promptly filed and suits against the F. & D. had to be commenced within 1 year from discovery of the loss; it was obviously impossible to obtain an adjudication of rights against the Surety Company before that time. To say that the receiver was compelled to guess correctly in advance the outcome of the present litigation is to place upon him a burden for which I am unable to find any authority.

The remedy of the receiver against the F. & D. was not inconsistent with his remedy against the Surety Company but quite independent of it. Under the decision in *Fitchburg Savings Bank* v. *Mass. Bonding and Insurance Co.*, 274 Mass. 135, 149, it appears that the F. & D. was in the position of a sub-surety with reference to these

notes and bonds. It was not requisite to recovery against the F. & D. that the receiver should first exhaust his remedy against the Surety Company. If complete recovery had been had against the F. & D. with reference to these notes and bonds, the F. & D. would have been entitled to be subrogated to the rights of the receiver against the Surety Company under clauses 7 and 12 respectively of the F. & D. Blanket Bonds. As it turned out, complete recovery upon the Blanket Bonds was not had and, to whatever extent the F. & D. was entitled to be subrogated to the receiver's rights, it re-assigned those rights to the receiver in the compromise agreement.

In the notices and proofs of loss the receiver alleged that these bonds were fraudulent, invalid and uncollectable. These were conclusions of law, uttered for the sole purpose of giving to the F. & D. notice of the claims against it with sufficient specification to allow it to investigate the circumstances and defend against the claims. These conclusions did not indicate an intention to disaffirm the bonds

(which would have been an equitable tort to the F. & D.'s right of subrogation). The notice and proof of claim were not public records; they were not addressed to the Surety Company; the Surety Company has not been harmed by them and has not changed its position in reliance upon them. No element of equitable estoppel exists.

It has been urged that it is important that the Surety Company was a re-insurer of the F. & D.'s obligations and that counsel for the receiver knew this fact. I rule that this has no materiality.

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RULINGS ON EVIDENCE.

The bonds and "endorsements", most of the testimony of Cliff and Cronin and some bank records were introduced without contest, but, with negligible exceptions, all other testimony introduced was objected to by one party or the other and exception taken. All of these objections were directed to the materiality of the testimony offered. Pursuant to the rule of conduct prescribed in *Kansas Loan & Trust Co.* v. *Electric Ry. etc. Co.*, 108 Fed. 702, I admitted all testimony which was to my mind conceivably relevant and found the facts based upon such testimony whether or not these facts seemed to me material. The questions raised by the objections which the parties made are equally open to them in arguing matters of substance. It may safely be said that no possible objections on grounds of materiality have been waived.

Following the submission of a draft report counsel for the Surety Company suggested that the second sentence in the above paragraph should commence with the word "Most" instead of the word "All", and added: "We request that all of the testimony objected to and admitted without that limitation be reported with the objections thereto." No such evidence or objection was pointed out, and I therefore decline to follow the suggestion.

At the request of counsel for the Surety Company I state that all testimony as to the bank examiner's reports was admitted subject to the objection and exception of said counsel. The objection was on the ground of materiality and is quoted in Exhibit H, paragraph 2,

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hereof. The reports themselves were not offered in evidence and their full contents do not appear. I am requested to report all testimony relating to these reports but I decline to do so.

PROCEEDINGS UPON DRAFT REPORT.

I submitted a draft report to counsel and received written suggestions.

Counsel for the Surety Company requested a report of all the testimony. This I decline to do.

Counsel for the Surety Company requested a report of the evidence on certain questions of fact as to which the contention was made that there is no sufficient evidence to support the findings. This, it seems to me, should be done. Evidence on these points is presented in Exhibit H hereto. The testimony has been reduced to narrative form where accurate paraphrase is possible; but with reference to the most serious and far-reaching of these objections (the finding that Clark relied upon the bonds) no accurate paraphrase would appreciably shorten the testimony and it has therefore been given in interrogatory form.

Counsel for the Surety Company objected to the giving of reasons for the rulings of law and requested that all such reasons be stricken out. It is my understanding that the "conclusions of law", which I am to report under the order of reference, include the basis in authority and reason of the rulings given. I therefore decline to follow this request.

Counsel for the receiver requested findings as to an incident which I believed and still believe to be immaterial. However, I make the findings in Exhibit J hereto and incorporate the same herein by reference.

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CONCLUSIONS AND RECOMMENDATIONS FOR JUDGMENT AND DECREE.

I conclude that all of these bonds are binding obligations of the Surety Company and that there is therefore no ground upon which they can be cancelled. I conclude that the Surety Company is in-

debted to the receiver in the following amounts on the following bonds:

Cronin bond: $14,000 with interest at 6 percent from December 6, 1932, to date of decree.

Westchester bond: Nothing.

Stone bond: $52,000 with interest at 6 percent from July 30, 1932, to date of decree.

Robinson bond: $14,403.52 with interest at 6 percent from August 10, 1932, to date of decree.

As to the prayers of the Surety Company, all bills in equity should be dismissed. As to the prayers of the receiver, the Westchester case (Eq. No. 3851) should be dismissed, but in the other three cases a decree should be entered ordering the company to pay to the receiver the amounts specified.

In the law cases judgment should be entered for the defendant in the Westchester case (No. 5225 Law) and for the plaintiff in the amounts specified in the Robinson case (No. 5316) and the Stone case (No. 5317).. As previously noted, there is no law case with reference to the Cronin transaction.

Respectfully submitted,

R. BARTON LEACH,

Master and Auditor.

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EXHIBITS.

EXHIBIT A.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

Home Office 80 John Street, New York, N. Y.

No. $20,000.00

Know all Men by these Presents, That we, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having an usual place of business in Boston, as Surety, are held and firmly bound and obligated unto the

Continental National Bank of Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.), to be paid to said Continental National Bank of Boston, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make to the Continental National Bank of Boston, full and true payment of note in the amount of twenty thousand dollars ($20,000.), maturing September twenty-second, nineteen hundred and thirty, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.,

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten days (10), by registered mail, of such default, and the Surety Company shall within thirty days (30) pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default six months from date hereof and in no event exceeding twenty thousand dollars, ($20,000.).

Witness our hands and seals, and dated this 6th day of September A. D. 1930.

ARTHUR D. CRONIN [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL]

by Percy G. Cliff, Attorney-in-fact

EXHIBIT B.

Standard Surety & Casualty Company of New York

Home Office 80 John Street, New York

No. 1038

GENERAL POWER OF ATTORNEY

Know all Men by these Presents: That the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and having its executive offices in the City of New York, New York, does hereby make,

constitute and appoint Percy G. Cliff or R. L. Carven, Boston, Massachusetts, its true and lawful attorney-in-fact with full power and authority at to make, execute and deliver, with or without the impression of its corporate seal, for and on its behalf as surety, any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them, which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise; all as described and authorized in the resolution of the Board of Directors of the Standard Surety & Casualty Company of New York, hereinafter set out, but reserving to itself full power of substitution and revocation,

and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents, as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons.

This power of attorney is made and executed in accordance with and by the authority of the following Resolution adopted by the Board of Directors of the Standard Surety & Casualty Company of New York at a meeting duly called and held on the 14th day of December, 1928.

Resolved, that the president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries and attorneys-in-fact, and to give such appointees full power and authority to sign and to seal with the company's seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.

Resolved, that attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any

of the By-Laws of the Company, and to any Resolution adopted by its Board of Directors.

In witness whereof, the Standard Surety & Casualty Company of New York has caused these presents to be signed and its corporate seal to be affixed by its proper officers, thereunto duly authorized, at the City of New York, New York, this 5th day of October, 1929.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL]

By: John R. English, Vice-President

Attest: Edward J. Halligan, Assistant Secretary

State of New York

City and County of New York, ss.

On this 5th day of October, in the year 1929, before me personally came John R. English to me known, who, being by me duly sworn, did depose and say: That he resides in State of New Jersey; that he is Vice-President of the Standard Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of the said corporation; that the Seal affixed to said instrument is such corporate seal; that it was affixed to such instrument by and under authority conferred by the Board of Directors of said corporation; and that he signed his name thereto by like authority.

F. H. COLQUHOUN,

[SEAL] Notary Public

State of New York

City and County of New York, ss.

I, Edward J. Halligan, Assistant Secretary of the Standard Surety & Casualty Company of New York hereby certify that the foregoing is a true and correct copy of a Power of Attorney, issued by the Standard Surety & Casualty Company of New York and is in full force and effect.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary and affixed the corporate seal of the Standard Surety & Casualty Company of New York, this 10th day of June, 1930.

EDWARD J. HALLIGAN,

[CORPORATE SEAL] Assistant Secretary.

EXHIBIT C.

ENDORSEMENT

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended to November 3rd, 1931, is hereby further extended in an amount not to exceed $14,000.00 or such portion thereof, as may remain unpaid on date of November 3rd, 1932.

In event of default on the part of the Principal, said Arthur D. Cronin of Boston, the obligee the said Continental National Bank of Boston shall notify the Home Office of this Company at #80 John Street, New York City within five days by registered mail of such default.

Witness our hand, this second day of November, nineteen hundred thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT D.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.), to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

SCHEDULE OF NOTES.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the Home Office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December, A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION

By Joseph Stone, Treas. [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT E.

Frank G. Morris, President Standard Surety & Casualty Company of New York

Home Office: 80 John Street, New York

Boston Brank Office: 33 Broad Street

Percy G. Cliff, Manager

Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT

For value received, Note Guarantee Bond issued in favor of the

Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June, A. D. Nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-fact

EXHIBIT F.

No. 9485–31 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Con-

tinental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.-00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

[CORPORATE SEAL] By Percy G. Cliff, Attorney-in-fact

EXHIBIT G.

No. 12420–31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000.00) maturing Novem-

ber eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON
D/B as Robinson Engineering Co.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
[CORPORATE SEAL] by Percy G. Cliff, Attorney-in-fact

EXHIBIT H.

REPORT OF CERTAIN PORTIONS OF TESTIMONY

Counsel for the Surety Company objects to several of the findings of fact on the ground that they are not supported by sufficient evidence to justify the finding. These objections are now dealt with in the order of their appearance in the Report:

1. Page 17, first full paragraph. [Printed page 54.] It is objected that the inference and finding as to Cliff's knowledge is not justified. I decline to report the evidence on this point, since I have stated that this is a conclusion of fact drawn from subsidiary facts previously stated. No objection has been made upon the ground that any one of the subsidiary facts found was unsupported by sufficient evidence.

2. Pages 17–18. [Printed pages 54–55.] It is objected that findings as to what the National Bank Examiners discovered, concluded and reported are unjustified because of a limitation under which cer-

tain evidence was received. Fred D. Williams, Chief National Bank Examiner for this district, was testifying with one of the quintuplicate copies of the Examiners' reports before him. Counsel for the Receiver asked what notations were made by the Examiners opposite the Cronin, Westchester, Stone and Robinson loans. Counsel for the Surety Company objected "on the ground that it is immaterial to any of these cases that the existence of these bonds was brought to the attention of the National Bank Examiners and/or that they relied on them." I overruled this objection, and an exception was taken. Counsel for the Receiver stated that the "remarks" of the Examiner were offered "as remarks that went to this bank, were examined by the directors, that went to the Comptroller of the Currency, and that went to the Federal Reserve Bank. Not on the truth of the remarks at all."

I do not undestand that this colloquy does more than to prevent the evidence from being used as proof that the four loans in question were as sound as they were reported. The entire purpose of the offer was to establish the fact that these bonds had been relied upon by the responsible examining officials as securing the various loans.

3. Page 19, first paragraph. [Printed page 55.] It is objected that there is no evidence that "the Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. Sec. 55." I am requested to report the evidence on this matter. It is as follows:

Fred D. Williams testified that the bank examination which ended March 3, 1931, showed a depreciation in the bond account at that time of $215,138.84, and an impairment of capital of $43,000; that he had something to do with negotiations with various parties relative to their putting in new money into the bank.

> *Q.* (by Mr. Hoar). And whether or not it is a fact that from time to time the date on which new capital was required or new money was required to be put into that bank was extended from time to time during the spring of that year? *A.* Yes, sir.
>
> *Q.* Did you have to do with that yourself, Mr. Williams, that extension? *A.* Well, only through my connection with the Comptroller's office. I think in some cases I recommended that they be given a little more time. We had reason to think that

the amount of money we desired to put into the bank was being raised. The extension of time was on the question of the Comptroller forwarding notice of capital impairment.

J. Dudley Clark testified that on June 29, 1931, he put $300,000 into the Boston-Continental National Bank; that he had talks with Ragan about it.

Q. (by Mr. Hoar). In connection with the bank examiner's report [of March, 1931] that you talked with Mr. Ragan about, did he say anything to you as to what that showed as to the depreciation in bonds? *A.* Yes, he did.

Q. And do you remember offhand the figures? *A.* Roughly, $300,000.

Q. And that was what you were asked to put your money in for? *A.* That is right.

Q. Was to— *A.* Make the bond account good.

Attention should also be called to the circumstances set forth in Judge Brewster's decision in *Clark* v. *Boston-Continental National Bank,* 9 F. Supp. 81.

4. Page 20, paragraph numbered (1). [Printed page 56.] It is objected that there is no evidence to support the finding that "that statement [to Forrester that the loans were secured by surety bonds] would not have been made if the bonds had not existed." This finding is, of course, a conclusion of fact which I draw from the subsidiary undisputed facts that Ragan was eager to get Clark to invest $300,000 in the bank and was trying to make an impression of soundness and honesty upon him. I infer that he would not have run the risks involved in a lie so easily discoverable by inspection of records and documents available to Forrester. On this issue there is no evidence to report other than that heretofore stated.

5. Page 21, lines 5–9. [Printed pages 56, 57.] It is objected that there is no evidence to support the finding that the Comptroller imposed no further requirement than the contribution of $300,000. This finding is based upon inferences drawn from the testimony of Mr. Williams, above quoted that "We had reason to think that the amount of money we desired to put into the bank was being raised"

and from the fact that, after Clark's contribution of $300,000, the bank was in fact allowed to continue in business until closed on December 17, 1931. See also *Clark* v. *Boston-Continental National Bank*, 9 F. Supp. 81. See also Clark's testimony, hereinafter set forth, as to what he was told by Ragan and Stoneman as to the Comptroller's requirements.

6. Page 21, lines 11 *et seq.* [Printed page 57.] It is objected that there is no evidence to support the finding that "the Comptroller relied directly upon the Examiners' having seen the Surety Company bonds." The evidence upon this matter was as follows:

O'Donnell testified that he was in charge of the bank's collateral; that as a matter of custom the first thing the Bank Examiners did in conducting an examination was to seal up the collateral so that they and no one else could have access to it; that they then proceeded to examine the collateral.

Fred D. Williams testified that he was the Chief Examiner for this district. He testified as to the contents of the reports of the three examinations referred to in the body of this Report. This testimony was received without other restriction than that stated with reference to the objection treated in paragraph (2) of this Exhibit. These reports showed statements that these various loans were secured by surety bonds. Williams also testified that one copy of the examiners' reports was sent to the Comptroller.

From this testimony I find that the Bank Examiners saw these bonds and that their notations in the reports of examination are to be taken as statements to that effect. From the fact that they were sent to the Comptroller I infer that they were read by him and that his action was based upon what he read.

7. Pages 24–25. [Printed pages 58–60.] It is objected that there was no evidence as to the practices or actual authority of the Comptroller and that the volumes referred to in the Report were not introduced in evidence.

The evidence on this point is the following:

a. William's testimony (above quoted) as to the pressure exerted in this particular instance to have the deficiency in the bond account

remedied. This I take as an indication of the modus operandi of the Comptroller.

b. Cliff testified that in each instance when Ragan requested a bond he did so on the ground that the Bank Examiners had to be satisfied. This I take as an indication of Ragan's solicitude to conform to the wishes of the Examiners.

c. Forrester Clark testified that after he became a director in the fall of 1931 the Executive Committee of the Board of Directors (which included Ragan) went over the loans which the Bank Examiners questioned to see whether they could be reduced or possible losses otherwise checked.

d. From the mere fact that an official body is appointed to examine into the affairs of a national bank, and to make a report to the Federal Reserve Bank (to which the bank must resort in large part for credit and support) and to the Directors (who elect the President) I am prepared to infer that the President of the bank would take any possible steps to avoid criticism by that body. This fact alone would give the Bank Examiners a very substantial practical authority.

The text book and the volume of the U. S. reports are, of course, referred to as indications of the administrative practices of a branch of the government so far as that may be judicially noticed.

8. Page 25. [Printed page 59.] It is objected that there is no evidence that the failure of the Comptroller to exercise his legal and practical authority with reference to these loans was in reliance on the bonds.

This is a conclusion of fact drawn from subsidiary facts previously stated.

9. Page 25. [Printed page 59.] It is objected that there is no sufficient evidence that "the depositors of these sums are still creditors of the bank in an amount exceeding the face value of these bonds".

One Long testified that between June 29, 1931, and December 17, 1931, there were received by the bank from new depositors $571,786.52, and that these depositors were still creditors of the bank at the time it closed in the amount of $258,511.13. The first figure was itemized in Exhibit 40 and examination of the figures indicates that

the deposits from new depositors after September 5, 1931, exceeded $300,000. There was no itemization of the second figure and it was therefore impossible to state with any accuracy the exact amount still owing to depositors since September 5. However, in the absence of any indication to the contrary I inferred that the percentage of withdrawals from deposits made after September 5 was not greater than the percentage of withdrawals from deposits made before September 5. Upon this basis I concluded that not less than half of the figure of $258,511.13 represented claims of creditors who became depositors after September 5, 1931.

10. Pages 19 to 23. [Printed pages 55–58.] It is objected that there is no sufficient evidence to support the finding that J. Dudley Clark relied upon these bonds. It is requested that the testimony of J. Dudley Clark and Forrester Clark on these points be reported in full, and I am convinced that this should be done to enable the Surety Company to present the question of law involved. This testimony constitutes all the evidence as to Clark's knowledge and reliance. It is as follows:

FORRESTER A. CLARK, Sworn.

Direct Examination by Mr. HOAR.

Q. Your full name is? *A.* Forrester Andrew Clark.

Q. And you are a son of J. Dudley Clark? *A.* Yes.

Q. Who is a senior member of the firm of Wainwright & Company? *A.* That is right . . .

Q. Your father put $300,000 into this bank on June 29, 1931? *A.* Yes.

Q. And did you on behalf of your father make certain investigations about the bank before that money was put in? *A.* Yes, I did.

Q. And when did you make those investigations? During what period? *A.* Between, I should say between the 5th and the end of June. The 5th and the 25th of June.

Q. And during the course of those investigations did you have occasion on more than one occasion to talk to Terrell M. Ragan about the bank? *A.* Yes, I did.

Q. He was then the president? *A.* Yes, he was.

Q. And at any time during that period did you have a talk with

Terrell M. Ragan concerning certain of the loans that the bank had outstanding which had been made to creditors? *A.* Yes, I did.

Q. Debtors, I should say. And what were the type of those loans? *A.* Both secured and unsecured.

Q. And were they large loans or small loans or both? *A.* Both.

Q. And what was the nature of that talk? As near as you can say what was said by Ragan and what was said by yourself?

Mr. Chase. Well, that I object to.

The Master. And what is the ground?

Mr. Chase. I don't know what the relevancy of the testimony is. A talk between this witness and Mr. Ragan.

Mr. Hoar. Well, I intend to show by this question and other questions of the same character following that this witness, representing his father, is a creditor to this bank to the extent of $300,000. His father's money was put into the bank relying on certain statements of Ragan which were made about the particular loans on which these bonds were given.

Mr. Chase. I object to it.

The Master. I admit that.

Mr. Chase. Subject to my exception.

The Master. Yes.

A. Well, I talked it over with Mr. Ragan—

Mr. Chase. What was said, I suppose.

Q. As nearly as you can remember? *A.* Well, I went over and asked Mr. Ragan, I told him that I wanted to check, I wanted to go over all the loans, all the important loans with him.

Q. And what, in substance was said? What was the general talk that you had with him about the loans? *A.* The general talk was—

Mr. Chase. No; I object. What was the talk?

Q. Well, what was the talk? You have got to give it as nearly as you can in substance, what the talk was. He said and I said. *A.* Mr. Ragan had a list of loans, and I asked him to go down the list and he went down the list of loans, each one, telling me whether they were secured or unsecured and what they were secured with and whether—stating that they were all good loans.

Q. And will you state whether or not in those talks the loans to

Arthur Cronin, Joseph Stone and the Westchester Discount Company were mentioned? *A.* Yes, they were mentioned.

Q. And what was said about those particular loans? Those three loans? *A.* He said they were secured by surety bonds.

Q. Did you see the bonds? *A.* No, I did not.

Q. Did he name the company that had issued the surety bonds? *A.* Not that I recall.

Q. And was that all in substance that was said about those three loans as you remember it? *A.* Well, I remember when they came up I asked him what a surety bond was and what it meant, and he explained that to me, and just the same as I took for granted when he said one loan was covered by 100 Steel and 100 Telephone, I took for granted that the bond was there. And when he had explained to me what they were I felt satisfied—

Mr. Chase. No.

Q. You cannot say that. You cannot say what you felt. But you say he said to you that these three loans I am talking about were secured by surety company bonds? *A.* That is correct.

Q. You don't think he mentioned the name of the company? *A.* He might have, but I don't recall it.

Q. Yes. And did you have conversations with your father after that? *A.* Yes, I did.

Q. As to what Ragan had told you about these loans? *A.* Yes, I did . . .

Q. When did you have these talks with Mr. Ragan that you have testified about? *A.* Between the 5th and the 25th of June.

Q. All right. When did you relate to your father the subject matter of those talks?

Mr. Chase. I pray your Honor's judgment as to that.

The Master. I admit that.

Mr. Chase. Note my exception.

A. Immediately after talking with Colonel Ragan . . .

Q. Was it before or after June 29, 1931—

Mr. Chase. That I object to.

The Master. I admit that.

Mr. Chase. Exception.

A. Before—

Cross Examination by Mr. CHASE.

X-Q. Well, where did you see those surety bonds? *A.* I did not see them . . .

X-Q. You didn't know of your own knowledge that there were any surety bonds? *A.* Mr. Ames saw them and told me so and I did not question his word. . . .

X-Q. You had not seen any surety bonds— *A.* No, sir.

X-Q. —purporting to cover those loans, had you? *A.* No, sir.

X-Q. And all you knew about it was what somebody else told you? *A.* That is correct.

X-Q. And that is what you meant when you answered my question and said that you knew of it? *A.* Yes, sir.

X-Q. You didn't know it of your own knowledge, did you? *A.* I did not see the surety bonds.

X-Q. So you did not know it of your own knowledge? It was because of what somebody else told you that you thought you knew? *A.* That is right.

X-Q. All right. Now who told you about those? *A.* Mr. Ragan first told me about them.

X-Q. Yes, he told you with reference to each of these four loans that I have mentioned that they were secured by surety bonds, didn't he? *A.* Yes, he did. Three then. Only three in June.

X-Q. Only three. Yes. Meaning the Cronin loan of $20,000, the Westchester and the Stone? *A.* Stone.

X-Q. Did you ask him if you could see those surety bonds? *A.* No, I did not.

X-Q. Why not? *A.* Why not?

X-Q. Yes. *A.* Why, he gave me a whole list of secured loans. I didn't think there was any reason—for instance, there was one loan of $20,000 secured by 100 Steel, 100 Motors, 100 United Fruit, and so forth, and I certainly could not have taken the time in those two weeks that I had, along with my own business and getting married, to have him show me every one of those things. And I took it for granted he was telling the truth.

X-Q. Now, you have given me a reason that convinces me very much. You were going to be married. Did you ever see those bonds? *A.* No, sir.

X-Q. So that so far as you have referred to those bonds you have been talking about something you have never seen? *A.* That is correct.

X-Q. As an officer of the bank you never saw them? *A.* As a director of the bank I never saw them.

X-Q. As a director. Did you ever ask to see them? *A.* No . . .

JOHN DUDLEY CLARK, Sworn.

Direct Examination by Mr. HOAR.

Q. Your full name is? *A.* John Dudley Clark.

Q. And where do you live? *A.* Legal or residence? My legal residence?

Q. Legal. *A.* Sherborn, Massachusetts.

Q. You are a senior member of Wainwright Company? *A.* I am.

Q. Have been for some time? *A.* Yes, sir.

Q. A brokerage concern in the city of Boston? *A.* That is right.

Q. Some time in the spring of 1931 did you become interested in the Boston-Continental National Bank, so called? *A.* I did.

Q. And did you later on put some money into that bank? *A.* I did.

Q. And how much was it? *A.* $300,000.

Q. And when was that? *A.* Well, I think it was in March, 1931, if I can remember.

Q. Would it refresh your memory if I told you that it was June 29, 1931? *A.* June.

Q. Now, before you put that money into the bank did you have various conferences with various people about the affairs of the bank? *A.* I did.

Q. And among those people were whom? *A.* Well, Mr. Ragan.

Q. The president of the bank? *A.* The president of the bank.

Q. Yes. *A.* And a man named Castle. And two or three directors of the bank.

Q. Yes. *A.* And I cannot remember exactly who else I did have it with.

Q. David Stoneman? *A.* David Stoneman; yes.

Q. And your son? *A.* And my son, of course.

Q. And your son's name is Forrester Clark? *A.* Forrester Clark.

Q. And at some time or other, before you put that money in, whether at some time or other you went over with Mr. Ragan certain loans in the bank? *A.* I went over three or four times, of course, and spent hours with him going over these loans.

Q. And did you do that by going over the loan cards? *A.* I did.

Q. And did your son also at your request make an investigation of the bank and its affairs? *A.* Yes. He spent much more time doing it than I did.

Q. And that was all done before your money was put into it? *A.* Yes.

Q. And did your son report to you from time to time as to the result of the various investigations he had made? *A.* He did.

Q. Did Mr. Ragan show you any statements of any kind outside of loan cards and loan things that you went over? *A.* Yes, he showed me a published statement in, I think it was the paper, of the condition of the bank.

Q. And you say that was a statement that was published in the paper or a copy of it that he showed you? *A.* A copy of it. A copy of the statement that was published in the paper.

Q. And was that a copy of the quarterly statement that was published in the newspapers? *A.* A quarterly statement, as I remember it.

Q. And do you remember for what quarter that statement was published that you saw a copy of? *A.* It was the quarter previous to, or the one near—it was the one at the time that he wanted me to put the money in, showing the condition of the bank.

Q. Well, would that be the one that was published around the end of March, if you put your money in in June? *A.* I think that was it; yes.

Q. And did you examine that statement? *A.* I did, very carefully.

Q. Now, did Tim at any time before you put your money into the bank—and when I say Tim I mean your son— *A.* Forrester.

Q. Forrester. —make any statement to you about certain loans and whether or not they were secured by surety company bonds? *A.* He did.

Q. And what did he say to you about that?

Mr. Chase. Now, may I make an objection here which will be a general one as to the testimony which follows of this character, which we anticipate.

The Master. And the basis of that objection?

Mr. Chase. Is that there is no reliance which can be based on anything which was said to Mr. Clark.

The Master. Yes, I understand that, and I overrule that objection and admit the testimony and save Judge Chase's exception to the line of testimony directed to establish reliance by Mr. J. Dudley Clark upon the status of loans as reported to him.

Q. Now, the question, Mr. Clark, was what your son said to you about any loans in connection with any surety company bonds? What he said? *A.* Well, on some of the larger loans I asked him if he checked up carefully on them and he said that on certain ones there were surety bonds guaranteeing those accounts, as I remember it.

Q. And did he name to you what those loans were? Do you remember? *A.* Yes, I think I remember some of them.

Q. Can you remember the names of some of them? What were they? *A.* Well, there was a Cronin loan.

Q. Yes. *A.* And a Westchester loan.

Q. Yes. *A.* And a man named Stone.

Q. Yes. In your talks with Ragan—I understand that you spent hours with him going over loans, and so forth? *A.* Yes, I did.

Q. Besides this statement, a copy of the statement, published statement, which you have testified about, did he show you or say anything to you about the report of the National Bank Examiner? *A.* He told me that he had a report and that the Bank Examiner reported the bank in excellent condition.

Q. And did you ask him to see the report? *A.* I did.

Q. By the way, do you remember for what period that report was or when it was made? *A.* I don't remember.

Q. How old was it when you talked with him? *A.* It was just a month or two old, as I understand it. It may not have been as old. It was the recent one made.

Q. The last one made? *A.* The last one made.

Q. And if it appeared that there was one made in March that would be the March report? *A.* I think so.

Q. And you say you asked him to see a copy of it or to see it? *A.* I asked to see it and he kept putting me off.

Q. Did you ever see it? *A.* I never saw it.

Q. Did you have any reason to suppose that when he kept putting you off his statements about it could not be relied upon by you? *A.* Not at all. I had absolute confidence in him.

Q. And is that true of all the other statements he made to you before you put your money in the bank? *A.* Absolutely, or I would not have put it in there.

Q. Now, in putting your money into the bank, will you tell me whether or not you relied in whole or in part on the statements that you have testified to that were made to you by your son Forrester and on the statement that was shown to you by Ragan and on the statement that Ragan made about the contents of that Bank Examiner's report? *A.* That is right, exactly. That is why I put my money in there. I had absolute confidence in him . . .

Q. Did you know in 1931 when you were talking with Mr. Ragan about the National Bank Examiner's report as to what the purposes were, the reasons that caused National Bank Examiners in general to make examinations and reports on banks?

Mr. Chase. This will all be covered by my objection.

The Master. Yes.

A. To see if the bank were solvent or not.

Q. And for the protection of whom? *A.* Of the depositors and the stockholders.

Q. And did you know then in detail as to what the National Bank Examiner and his assistants did when they examined a bank such as this one? *A.* I didn't know in detail, but I knew—

Q. Well, did you know in general what they did? *A.* Why, of course I did. I thought I did.

Q. And what in general did you know that they did at that time? *A.* They examined the loans.

Mr. Chase. Could he have known? . . .

The Master. Well, I can see a reason for an objection to that word "know". If you will amend that question so it will say "understand".

Mr. Hoar. I will amend the question . . .

Q. Did you have a general knowledge in 1931 as to what National Bank Examiners did when they examined national banks?

Mr. Chase. That I object to.

A. Yes.

Mr. Hoar. And his answer was yes.

Mr. Chase. Well, I objected to it before he answered.

The Master. Yes, I understood that objection was made before the answer was made, but I will allow that question and note Judge Chase's exception . . .

And I understand that your examination still is applying here to what his understanding is . . .

And that is admitted only for the purpose of showing Mr. Clark's state of mind.

Mr. Hoar. Yes.

A. Well, I understood that when a bank examiner made a report of the bank he went into all the details of the bank and found out the financial condition of the bank, that he examined the bank from bottom to top, the loans, both commercial loans and individual loans, and saw the condition of their investments and made a thorough report as to the exact condition in which he found that bank . . .

The Master. . . . I do understand, however, Mr. Clark, that your only knowledge as to the contents of the bank examiner's reports was what you were told by Mr. Ragan.

The Witness. That is right. And what my son found out from the various checkings of certain accounts and certain of their cards.

Q. And let me ask you this, Mr. Clark. . . . In connection with the bank examiner's report that you talked with Mr. Ragan about,

did he say anything to you as to what that showed as to the depreciation in bonds? *A.* Yes, he did.

Q. And do you remember offhand the figures? *A.* Roughly, $300,000.

Q. And that was what you were asked to put your money in for? *A.* That is right.

Q. Was to— *A.* Make the bond account good.

Q. Make the bond account good. Now, did you know at that time or were you told at that time by Mr. Ragan anything about the length of time that he, Mr. Ragan, had been given to get money to get that bond account good, to make that bond account good? *A.* A very short time. I don't know—

Q. You mean he did tell you? *A.* He told me it was a very short time. And that is why— I was going to have—

Q. Now, there was some question at one time or another as to whether you would not have an independent audit of that bank? *A.* That is right . . .

Q. What was the time if you remember that was fixed when the depreciation in the bond account had to be made up by putting in money? *A.* As I recall it was a week or ten days.

Q. And you mean by that, do you, and correct me if I am wrong, that that is the time you had to make this investigation after you decided that you were interested in it? *A.* That is right.

Q. And do you know who put that condition on that it must be a week, the money must be put in there within a week or ten days?

Mr. Chase. How could he?

The Master. Well, just a minute.

Q. Just say yes or no.

The Master. Well, the question was, was he told?

Mr. Hoar. Yes.

Q. Were you told? *A.* As I recall, I was told that it was the Federal examiner, comptroller of the currency.

Mr. Chase. I suppose Ragan told him.

Q. Who told you? *A.* Mr. Stoneman and Mr. Ragan both.

Q. Now, Mr. Clark, before you testified here you talked with me about this matter. *A.* I did.

Q. And you have gone over to some extent the testimony you gave in the case that you had against the bank? *A.* Yes, absolutely.

Mr. Hoar. I think that is all . . .

Cross Examination by Mr. CHASE.

X-Q. Mr. Clark, you were interested in the bank in some way before you met Mr. Ragan and talked with him about putting in money to supply the deficiency in the bond account, weren't you? *A.* Not to any great extent. I was interested in the old Boston National Bank.

X-Q. Yes. *A.* Simply as a stockholder.

X-Q. Which was merged with the Boston-Continental. *A.* Yes. But I had nothing to do with the Continental until I met Mr. Ragan.

X-Q. Well, your interest continued, didn't it, after the merger? Weren't you a stockholder? *A.* Well, not to any great extent; no.

X-Q. Well, you were a stockholder? *A.* I was a stockholder.

X-Q. And you had bought, either for yourself or for others, a substantial amount of the stock in the old bank? *A.* Yes, I held a substantial amount at one time . . . 1120 shares, I think.

X-Q. It is true, isn't it, that at the time you began these conversations with Mr. Ragan you were a stockholder? *A.* I was a stockholder; yes.

X-Q. You had some very substantial customers in your brokerage house that were very closely interested in the bank, didn't you? *A.* Yes, I had quite a number of those, too.

X-Q. And through them you had heard a good deal about the bank? *A.* Yes.

X-Q. And you knew they were interested in the success of the bank and knew that they were closely in touch with the management and affairs of the bank, didn't you? *A.* Yes, I imagine some of them were.

X-Q. And it was from one of your customers, wasn't it, that the suggestion that you become interested in some way, financially interested outside of being a stockholder in the bank, came? *A.* Yes.

X-Q. And that was through Mr. Castle? *A.* Mr. Castle.

X-Q. And he was a man who was not only a very substantial cus-

tomer in your house but a man in whom you had great confidence? *A.* I did.

X-Q. And you also had in mind, didn't you, after the matter was mentioned to you, the possibility of an opening for your son in the bank? *A.* No, not necessarily that.

X-Q. Not necessarily? *A.* No.

X-Q. But you did have it in mind? *A.* It might have been.

X-Q. Yes. And you had another thing in mind, didn't you, and this was suggested to you by Mr. Castle, wasn't it, that through an intimate financial connection with the bank you might acquire customers who would be valuable in your business, in your own business? *A.* That is true.

X-Q. And in fact that was held out to you as an inducement by Ragan, wasn't it? *A.* It was.

X-Q. And you did acquire substantial customers— *A.* That is right.

X-Q. —who were profitable to your brokerage house through the connections which you made with the bank, didn't you? *A.* Yes, sir.

X-Q. Now, you have said that amongst those whom you talked with was Mr. Stoneman? *A.* Yes.

X-Q. Who is Mr. Stoneman? *A.* He is a lawyer and he was at one time a director of the bank.

X-Q. Was he at the time when you talked with him? *A.* Yes.

X-Q. First? A director? *A.* Yes, a director of the bank.

X-Q. Well, wasn't he counsel for the bank? *A.* I think he was counsel also.

X-Q. Wasn't he counsel for the bank, and interested at that time particularly in finding somebody, who ultimately proved to be yourself, who would put in money to supply the deficiency in the bond account? *A.* I think so, yes. He spoke about it.

X-Q. And you had extended talks with Mr. Stoneman? *A.* I did.

X-Q. And you had extended talks with Mr. Castle, didn't you? *A.* Yes.

X-Q. And Mr. Castle, when the receiver was appointed, was a very large debtor to the bank, wasn't he? . . . *A.* I don't know about that.

X-Q. Well, if you don't know about it, I will drop it. You also had talks with Mr. Balter, didn't you? *A.* Yes, sir.

X-Q. And he was another customer of your business house? *A.* That is right.

X-Q. And isn't the question which I just asked you with reference to Mr. Castle true of Mr. Balter, that he was a large debtor of the bank? . . . *A.* I think it turned out to be that he was.

X-Q. And before the Receiver was appointed the loan to Mr. Balter was a matter of grave discussion in the bank, wasn't it? *A.* Before when?

X-Q. The loan to Mr. Balter, before the Receiver was appointed? *A.* No, I hadn't heard that . . .

X-Q. You never saw any bonds, surety bonds, in the bank? *A.* No, I never did.

X-Q. You never saw any powers of attorney in the bank? *A.* I didn't see those.

X-Q. You never asked to see them? *A.* I never asked to see them.

X-Q. You never heard any surety company mentioned as being surety on any of the bonds which you have said Mr. Ragan spoke to you about? *A.* Before I went into it?

X-Q. Yes. *A.* My son told me—

X-Q. No. You never heard the name of any surety company mentioned? *A.* Well, I am not so sure about that.

X-Q. You don't recall that you did? *A.* I can't recall it right now; no.

X-Q. It took some time, didn't it, for Mr. Castle, for Mr. Stoneman and for Mr. Ragan to get you interested? *A.* Yes, it did. Some time but not a great deal.

X-Q. That is, at first you said it did not interest you at all? *A.* Yes, absolutely.

X-Q. And because of what they said to you, and they alone, you finally did say you might be interested? *A.* That is right.

X-Q. And it was because of what they told you? *A.* That is right.

X-Q. That you said that? *A.* Yes.

X-Q. Now, you say that your son went over to the bank and spent some time there with Mr. Ragan? *A.* He did.

X-Q. Now, you say also that you have been over the testimony which you gave in your suit against the bank recently? *A.* I have.

X-Q. With Mr. Hoar? That is so, isn't it? *A.* Yes.

X-Q. Now, you did testify in that case at length? *A.* I did.

X-Q. Concerning all of the negotiations that led up to your putting in the $300,000? *A.* Right.

X-Q. That is right, isn't it? *A.* Right.

X-Q. And all of your subsequent connections which you had with the bank and what you did and what you heard and what was told you, you testified at great length about that? *A.* I did.

X-Q. And you were cross-examined by Mr. Hoar? *A.* I was.

X-Q. Who was counsel for the Receiver in that case? *A.* That is right . . .

X-Q. Didn't you testify in that case that you told your son to look into the condition of the bank? *A.* Why, of course I did.

X-Q. Yes. And didn't you testify in that case that he went over to the bank and spent several days there? *A.* Yes.

X-Q. And didn't you also say "I don't know what he was doing there. He said he was looking into the affairs of the bank but he made no definite statement to me." Or in substance that? *A.* What does that refer to?

X-Q. It refers to what your son was doing in the bank and what he said to you? *A.* Well—

X-Q. My only question is, Didn't you so testify? *A.* Well, if it is there I must have testified to that . . .

X-Q. You now say, do you not, that you yourself went over to the bank and talked with Mr. Ragan about loans? *A.* Yes.

X-Q. And that you spent some time there? *A.* I did off and on; yes.

X-Q. Now, as a matter of fact didn't Mr. Ragan at that time have on his desk for your inspection the loan cards of the persons to whom the bank had loaned money? *A.* He did.

X-Q. And there were a great number of them there? *A.* A lot.

X-Q. And they were produced by him for your inspection? *A.* That is right.

X-Q. In response to your request? *A.* That is right,

X-Q. And there were from 500 to 1,000 of them, weren't there? *A.* I should think there were that many, yes.

X-Q. And those were placed on Mr. Ragan's desk by him for your inspection and you were invited in some form of words to ask him any questions about any one of them or any of them that you wanted to? *A.* That is right.

X-Q. And that is what you did? *A.* I did.

X-Q. That is you ran through them, I assume? *A.* I ran over them.

X-Q. And took out those that you knew—you knew some of the borrowers, I assume? *A.* I knew some of them, yes.

X-Q. And as to those, of course, you did not ask any questions, did you? *A.* Yes, I asked him about different ones and he gave me an explanation for each one.

X-Q. I assume that you did not take out each card and ask him about each one of those five hundred or one thousand? *A.* No, because I had confidence in Mr. Ragan then.

X-Q. You had confidence in him and if he told you that those loans were all right you believed him? *A.* I did.

X-Q. So that so far as these loan cards were concerned it was largely a matter of formality or curiosity to see who the borrowers were? Is that so? *A.* Well, not necessarily.

X-Q. Not at all. Nothing is necessarily. But isn't that so? *A.* I thought the cards any president of a bank would show you were legitimate cards.

X-Q. Surely. And you did not inspect them very carefully and did not ask very searching questions about them, did you? *A.* Well, I did on certain ones, yes, I did.

X-Q. And the certain ones were the ones you knew about, names that you knew? *A.* No, not necessarily. Some I didn't know at all.

X-Q. And you were asked about that in your case against the bank, weren't you? And didn't you say that Mr. Ragan said they were absolutely O. K. and that he knew these borrowers personally and they were all right? *A.* Yes.

X-Q. And that applied to the whole batch, didn't it? *A.* Practically; yes. I imagine so.

X-Q. And didn't you say that the ones that you looked at were all O. K.? And I am using O. K. as your expression in your testimony? *A.* The ones which I saw, so far as I knew, they were O. K.

X-Q. The ones you looked at so far as you knew they were O. K.? *A.* Yes.

X-Q. And didn't you say also, "Maybe he had some that were not, but I didn't see them"? *A.* Maybe there were. That is the remark I made.

X-Q. And didn't you say that you picked out the cards that he was to make comments on? *A.* Yes, I did. I think I said that.

X-Q. And that they were collateral loan cards secured by stock exchange collateral? *A.* Some were and some were not.

X-Q. And that there was also a list of unsecured loans and you went over those? *A.* There were.

X-Q. And asked about persons? *A.* Yes.

X-Q. Now, didn't you also testify in that case that you did not remember the names of the cards that you discussed, the borrowers that you discussed with Mr. Ragan? *A.* I didn't remember them all.

X-Q. Didn't you say that you did not remember the names? *A.* If that is my testimony at the time, that is the statement I made.

X-Q. And didn't you also then say that Stone was one of those mentioned? *A.* Did I say what? I didn't get it.

X-Q. Didn't you also say then that Stone was one of those who were mentioned? *A.* Yes, I think I did.

X-Q. And didn't you further say that all that Mr. Ragan said about Stone was that he was a personal friend of his and that he was perfectly sure that was a good loan and that you didn't remember especially about it then, at the time you so testified? *A.* Well, that may have been my testimony then, but my son during this whole thing did tell me about those things.

X-Q. Wait a minute.

Mr. Chase. I ask to have that stricken out.

X-Q. And I am asking you now about what your testimony was in the other case when that was tried? *A.* Well, if that is my testimony.

X-Q. Well, is it your testimony or not? *A.* What?

X-Q. Is it your testimony or not? *A.* Well, it must have been.

X-Q. And didn't you also say when you testified before about this that you could not recall about the Cronin loans? *A.* I don't remember that now. I should have remembered Cronin because of course he was a customer of mine also and I should have remembered that very well.

X-Q. Cronin was a customer? *A.* He was a customer.

X-Q. You had confidence in him? *A.* I did at that time.

X-Q. And you believed his loan was good? *A.* What?

X-Q. You believed this loan was good from what you knew about him? *A.* Well, I think so; yes.

X-Q. Now, you have already said, Mr. Clark, that you did have confidence in Ragan. You had confidence in him? *A.* In whom?

X-Q. In Ragan. *A.* Yes, I did.

X-Q. And believed him absolutely as long as he lived, from the time when you first met him in connection with this matter, didn't you? *A.* I did.

X-Q. You bought, from the spring of 1931 up to the time of his death, you bought a very substantial amount of stock for him, didn't you? . . . *A.* I did. I bought quite a lot of stock.

X-Q. That ran into the thousands of shares? *A.* Not in the thousands. Probably—yes, probably thousands.

X-Q. And Ragan didn't pay you for that, for the stock? . . .

X-Q. That is so, isn't it? *A.* I bought it for myself, not for Ragan.

X-Q. For yourself? *A.* For myself.

X-Q. So that you were holding stock for him and you also bought it for yourself? *A.* Holding stock for Ragan?

X-Q. Yes. *A.* No; I was buying it for myself.

X-Q. You bought it on his order, didn't you? *A.* On his order?

X-Q. Yes. *A.* I bought it for my own order.

X-Q. Well, didn't you buy any stock for Ragan personally, himself? *A.* I don't recall now.

X-Q. Didn't you hold a life insurance policy of his in $50,000? *A.* Oh, yes, that is true.

X-Q. As security for stock which you bought for him? . . . *A.* That is right . . .

A. I had absolute confidence in Ragan . . .

X-Q. Well, when did Ragan die? *A.* Well, I don't remember now. He did die . . .

The Master. March 1, 1932, wasn't it?

Mr. Hoar. Right.

X-Q. How long before he died did you get that insurance policy? *A.* Well, I should say two or three months before.

X-Q. And that was the only security that you had for the stock which you purchased? . . . *A.* Well, I admit I had confidence in him right up to the end, to his death.

X-Q. I understand, and I think it is perfectly plain, but I think the extent of your confidence in him is what I am interested in at this moment. And the day before he died he asked you for that insurance policy? *A.* He did.

X-Q. And you gave it to him? *A.* I did. I had confidence in him then.

X-Q. And he said he would return it to you? *A.* He said he would return it to me.

X-Q. And you found, after he died, on the day after you gave it to him he made it over to his wife? *A.* That is right.

X-Q. Now, did you ever have any talk with Mr. Williams, the bank examiner, before you put any money into this bank? *A.* I cannot recall now whether it was just before or just after.

X-Q. You cannot say, can you? *A.* I cannot.

X-Q. You have said— *A.* Well, I remember now, I think.

X-Q. You remember now that you didn't? *A.* What?

X-Q. You remember now that you didn't have it? *A.* Well, I think still I did.

X-Q. You testified in your case against the bank that you never saw him before that, didn't you, positively? *A.* Well, I may have. I don't remember now. . . .

X-Q. Now, were you told by Mr. Stoneman or by Mr. Castle or anybody that along in May, 1931 the United States Attorney was in-

vestigating an act or acts of Mr. Ragan in connection with his management of the bank? *A.* No.

X-Q. Nobody ever told you that? *A.* Not that I remember.

X-Q. Mr. Stoneman or anybody else? *A.* No . . .

X-Q. You asked Mr. Ragan for the bank examiner's report, didn't you? *A.* I did.

X-Q. He didn't give it to you? *A.* No, he had some excuse.

X-Q. He had some excuse, one excuse or the other. *A.* I was just

X-Q. And you never did get it? *A.* I never did get it.

X-Q. And you never saw it? *A.* I never saw it.

X-Q. Did he ever tell you what was in the bank examiner's report? *A.* Not any more than it was entirely satisfactory.

X-Q. To him? *A.* To him.

X-Q. And that is all you know about the bank examiner? *A.* That is right.

X-Q. And nobody else ever showed you the bank examiner's report? *A.* No.

X-Q. You were given to understand that it was necessary or it was desirable to have the deficiency in the bond account made up in some way? *A.* That is right.

The Master. I don't know quite what that answer is. Did you understand it was necessary or desirable?

The Witness. It was necessary and desirable both.

X-Q. Did anybody ever tell you that the authorities had said that it was also necessary that Mr. Ragan should be removed as president, or supplanted?

Mr. Hoar. I object to that question until the time is apparent.

X-Q. Before you put any money in? *A.* Not before I put any money in; no . . .

X-Q. You had confidence in Ragan—I will preface that with another question. You did hear things before Mr. Ragan died and before this Receiver was appointed respecting Mr. Ragan's management of the bank, didn't you? *A.* Yes . . .

X-Q. Mr. Clark, this is true, isn't it, that with reference to any one of these loans that were shown to you, if Mr. Ragan had told you

himself, had given you his assurance that they were all good loans you would have believed him?

Mr. Hoar. I object to that.

The Master. No. I admit that.

Mr. Hoar. Your Honor will save my exception to that.

The Master. Yes.

A. Well, I am inclined to believe it, because I would go and ask him about it and he would prove it to me, or give some excuse . . .

X-Q. And I will take any one of these 500 to 1,000 loans, the cards for which were produced there on Mr. Ragan's desk, and which you say you went over some of with him, if you had criticized any of those loans, and Mr. Ragan had given you his assurance that they were good, you would have taken his assurance, wouldn't you? *A.* I would have been inclined to because the bank examiner was supposed to have got it, and he would have given some reason for it and I would have believed it.

X-Q. Mr. Ragan we are talking about now. We will leave the bank examiner out for the moment. If Mr. Ragan at that time had assured you that that particular loan was good, any loan that you questioned, you would have taken his assurance, would you not? *A.* Why, absolutely. He was president of the bank and I had confidence in him . . .

X-Q. You would absolutely take Mr. Ragan's assurance, would you not? *A.* He was president of the bank. I would.

X-Q. And you did? *A.* I did.

X-Q. You did not ask him when he told you that a loan was good, why? You did not ask him to explain why it was good and upon what he placed his reliance in assuring you that it was good, did you? *A.* I might have on some of them. I don't recall now.

X-Q. But you cannot recall any that you did? *A.* I cannot recall now.

X-Q. And it would not have made any difference to you, Mr. Clark, relying upon him as implicitly as you say you did, whether there was a surety bond or collateral securing a note, or whether the loan was unsecured, would it? *A.* Oh, I think it would have. He must have some reason for it for being good.

X-Q. Well, all right. Suppose he had a note there that you had heard was questioned by somebody and you said, "Well, Mr. Ragan, Mr. X has told me that that note is not good, that there is a defense to that note", and Ragan had assured you that that absolutely was good and that he knew it, you would have taken his assurance, wouldn't you? *A.* Well, I think that may have been just what happened here at the time that my son went over and saw these notes.

X-Q. Well, you would have taken his assurance, wouldn't you? *A.* I would have been inclined to take it; yes.

X-Q. That is it was Ragan that you relied on and your reliance on him was induced by your confidence in him? *A.* That is right . . .

X-Q. As a matter of fact, Mr. Clark, some time after June and before the Receiver was appointed, the examiner himself did criticise certain loans that Mr. Ragan had made, didn't he? *A.* He did.

X-Q. To you personally?

The Master. Now, pardon me. I did not get the time of this question. I understand this was after Mr. Clark had put his money in.

Mr. Hoar. Yes.

Mr. Chase. Yes, sir.

X-Q. He did? *A.* He did.

X-Q. Do you remember what those were? *A.* I don't remember now.

X-Q. They were pretty heavy loans, weren't they? *A.* I think so. I went over to Mr. Ragan and he—

X-Q. Yes. And you told Mr. Williams, the examiner, when he criticized those loans as being improper that sometimes opinions—individuals differed as to what was a good loan and what was not? *A.* I do not recall having said that to him.

X-Q. You so testified, didn't you, in the other case? *A.* Well, then it must be so.

X-Q. Well, the sum and substance of it is that when Mr. Williams did criticize those loans that you preferred to rest on Ragan's judgment rather than Mr. Williams'? Isn't that so? *A.* Not necessarily, no.

X-Q. Not necessarily, but as a matter of fact it is so? *A.* Well—

X-Q. You took Ragan's side as against Mr. Williams, didn't you? *A.* I went over to Mr. Ragan and asked him about these loans and he said. "Those can be worked out this way", and we thought we could work them out that way.

X-Q. And you were satisfied with that? *A.* Well, what else could I do?

X-Q. Well, I am not asking you that. I say you were satisfied with that in answer to Mr. Williams' criticism? You got Ragan's assurance again, didn't you? *A.* I got Ragan's assurance that they would work out . . .

Redirect Examination by Mr. HOAR.

Q. As a matter of fact, Mr. Clark, when your son Tim told you that Ragan had told him that these three loans which you named were secured by surety company bonds you relied on that because you had implicit confidence in Ragan? Isn't that correct? *A.* Absolutely.

Mr. Chase. I object to that.

The Master. Now, that is objected to on what ground?

Mr. Chase. On the ground it has already been covered and it was leading. Mr. Hoar examined the witness fully about it.

The Master. Yes, but I will admit that question.

Mr. Chase. My exception . . .

Q. Now, there has been something said about an insurance policy, and I do not want to spend any time on it, your Honor, but I want to get the facts right.

Q. Around the 14th of December, 1931, three days before the bank closed, you delivered or caused to be delivered to Mr. Ragan a block of stock of the Boston-Continental Bank or voting certificate for that stock? That is right, isn't it? *A.* Yes.

Q. And you got at that time an insurance policy for $50,000 from Mr. Ragan to secure you on the payment of the purchase price? That is what it was for, isn't it? *A.* That is right . . .

Examination by the Master.

Q. Before you put the money into the bank on June 29, 1931, was it your understanding that the Comptroller of the Currency required $300,000 be put into the bank by some person before some limited

date, and that there was no other requirement? *A.* Absolutely, and I got a letter from him stating that it was with his approval that this was done. I think that letter is on file, isn't it?

Q. It is not in the evidence, and I must say that that part of your answer dealing with that letter ought to be excluded for the moment as unresponsive. But I am going to follow that up with one more question. Perhaps it is already answered, but I would like to be sure that I have the answer. Did you understand that there was no other requirement imposed by the Comptroller of the Currency to permit the bank to continue in business? *A.* Absolutely.

Q. And I am now going to ask you whether or not in any part you relied upon that situation as indicating the judgment of the Comptroller of the Currency as to the soundness of the bank? *A.* I should not have gone into it unless I had that letter from the Comptroller of the Currency. It influenced me very much.

Recross Examination by Mr. CHASE.

X-Q. And that information you got from Mr. Ragan. *A.* I got it from—that information?

X-Q. Yes. *A.* I got the letter addressed to me from the Comptroller of the Currency.

X-Q. Well, that letter I do not think is in evidence. If it is not, I do not want to go into the contents of it. But that referred to nothing but the $300,000. Now, I am asking you with reference to your understanding that that was the only requirement that the Comptroller put upon the continuance of the bank in business. And that assurance you got from Mr. Ragan? That nothing else was necessary? *A.* Well, I insisted upon getting that from the Comptroller of the Currency himself.

X-Q. But the Comptroller of the Currency never told you that there was nothing else necessary except to put in $300,000? *A.* The Comptroller of the Currency knew that $300,000 was going in and with that I understood the bank could proceed.

X-Q. That is all he approved of? *A.* What?

X-Q. The putting in of the $300,000? *A.* That is what he wanted.

X-Q. He never told you that nothing else was the matter with the

bank? *A.* Well, he didn't tell me so, but he permitted me to believe in this letter.

X-Q. That answers the question. And any understanding that the requirement that $300,000 be put in before a certain date was the only requirement that the Comptroller made— *A.* That is what I understood was the only requirement.

X-Q. —came from Mr. Ragan? *A.* Yes, it did.

Mr. Chase. That is all.

Redirect Examination by Mr. HOAR.

Q. Wasn't there anybody else told you that also besides Mr. Ragan?

Mr. Chase. I object to that.

The Master. No, I think that is all right.

Mr. Chase. I do not think he ought to lead this witness.

A. It was the bank examiner, as I understand it, that also said so.

The Master. To you?

The Witness. To me or to my son.

Q. Now, Mr. Clark, let me refresh your recollection. As far as the other case is concerned your testimony was, I think it is a fair statement, that you did not see Mr. Williams, the bank examiner, until after this money was put in, and I think it was finally left that some time in August was the first time you saw him. You had talks with Mr. Stoneman and Mr. Castle, as you testified in answer to my brother's question? *A.* That is right.

Q. And you have just answered a question— *A.* Mr. Stoneman—

Q. Just a minute. You have just answered a question to my brother that this requirement that $300,000 was the only requirement that the Comptroller of the Currency wanted, you heard that from Mr. Ragan? *A.* Yes.

Q. Now, I am asking you if you heard that from anybody else besides Mr. Ragan, if you remember? *A.* Mr. Stoneman . . .

Q. . . . I want to show you a letter, and this is a transcript of the evidence in your case, what purports to be a copy of a letter addressed to Mr. David Stoneman, Boston, Mass., and I ask you if that is a copy of the letter that you just referred to as having been received from the Comptroller? *A.* That is the one.

Q. As a matter of fact it came from Mr. Williams? *A.* Well, I insisted—

Q. This came from Mr. Williams? That is the one you referred to? *A.* That is the one I referred to . . .

It was agreed by counsel that the statements attributed by Mr. Chase to J. Dudley Clark in the latter's testimony in *Clark* v. *Boston-Continental National Bank* were in fact made by Clark.

EXHIBIT J.

ADDITIONAL FINDING REQUESTED BY RECEIVER.

On November 12, 1931, Oliver Ames, a Vice-President of the Bank dictated to Ragan's secretary in his presence a letter to the Surety Company stating that Robinson had asked for a renewal of his note and requesting the Company to confirm in writing their liability with reference to such a renewal. Ragan intercepted this letter before it got into the mails. He had Cliff write to the Bank as manager of the Boston Branch Office of the Surety Company informing the Bank that Ames's letter had been sent to him by the Home Office for answer, that he (Cliff) handled all New England business and that all questions should thereafter be referred to him, that the terms of the bond were explicit as to renewals, that there was no necessity for notice as to renewals and extensions and that "notice is required only within the stipulated period after the expiration of the bond itself." This letter was on stationery of the Surety Company. Cliff had no authority to send it. Ragan knew this, but the other officers and directors did not.

On the fourteenth day of said June, the following Plaintiff's Exceptions to Auditor's Report was filed:

PLAINTIFF'S EXCEPTIONS TO AUDITOR'S REPORT.

[Filed June 14, 1935.]

Now comes the plaintiff in the above-entitled cause and files the following exceptions to the report of the auditor filed herein on June 6, 1935, to wit:

1. To the ruling of the auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements". (Auditor's report, pages 40, 41 and 49 of the original). [Printed pages 71, 72, 78.]

By their Attorneys,

GOODWIN, PROCTER & HOAR.

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Exceptions of Standard Surety & Casualty Company of New York were filed:

EXCEPTIONS OF STANDARD SURETY & CASUALTY COMPANY OF NEW YORK TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Now comes Standard Surety & Casualty Company of New York and files the following exceptions to the report of the master and auditor:

1. To the statement on page 3 (1) of the report that the Surety Company contends that the bonds in suit were given "designed to deceive various persons as to the soundness of the notes".

2. To the statement on page 3 (4) of the report that the Surety Company contends that the receiver "by bringing a certain suit against the Fidelity & Deposit Company of Maryland elected a remedy which was inconsistent with the remedy now sought" without adding the remainder of the Surety Company's claim "and allowed said suit to go to judgment in his favor in the sum of $100,000, and allowed such judgment to be satisfied".

3. To the findings on pages 9 and 13 of the report, that each new note was a renewal or extension of the note first given.

4. To the finding (by inference) on page 17 of the report that Cliff knew that the bonds in question "would be shown to the bank's directors, to the representatives of the Boston National Bank in merger negotiations, and to any other person entitled to enquire as to the soundness of the notes they purported to secure and that the purpose of the showing would be to deceive the person so enquiring".

5. To the findings on pages 17 and 18 of the report as to what the national bank examiners discovered, concluded and reported.

6. To the finding on page 19 of the report that: "The Comptroller of the Currency insisted that $300,000 in new money be put into the bank, and threatened a notice of capital impairment under 12 U. S. C. sec. 55."

7. To the finding on page 20 (1) of the report that "that statement would not have been made if the bonds had not existed".

8. To the conclusion and finding on page 20 (1) of the report that, upon the evidence reported, "Clark indirectly relied upon the Cronin, Stone and Westchester bonds".

9. To the findings on page 21 (2) of the report that, upon the evidence reported, the Comptroller had imposed a requirement that $300,000 be contributed to the bank—"and had imposed no further requirement", that Clark relied upon this fact, and that the Comptroller relied directly upon the examiners having seen the Surety Company bonds; that he would have imposed further requirements if it had been known that the Cronin and Westchester loans were unsecured; that the Cronin and Westchester bonds induced the Comptroller's action; that Clark relied upon the willingness of the Comptroller to allow the bank to continue in business upon contribution of $300,000 as an indication that the condition of the bank was otherwise sufficient for continuance of business; and that Clark indirectly relied upon the existence of the Cronin and Westchester bonds, and to the conclusions and findings on page 23 of the report that Clark relied upon the existence of these bonds in investing $300,000 in the bank.

10. To the finding on pages 22 and 23 (4) of the report, that "there are limits to credulity. One loan might have been approved on Ragan's unsupported statement but not three totalling $112,000".

11. To the findings on page 23 of the report that the Cronin, Stone and Westchester bonds induced Forrester's statement and that the Cronin and Westchester bonds induced the Comptroller's action.

12. To the inference and findings set forth on pages 24 and 25 of the report that the Comptroller relied upon the bonds, and as to what the Comptroller of the Currency would, or might, have done

for the protection of depositors old and new, his powers and practices, and the findings of fact made from reported cases and books, and the finding that subsequent to the bank examination of August-September, 1931, new deposits were made in the bank exceeding $300,000 and that depositors of these sums are still creditors of the bank in an amount exceeding the face value of the bonds.

13. To the ruling on page 25 of the report that the facts stated justify a conclusion that depositors relied upon the bonds in question, and the conclusion to that effect, and the influence of reported cases upon the master and auditor in coming to that conclusion as stated by him on page 26 of the report.

14. To the ruling on page 26 of the report that "a reliance by the Comptroller and examiners should have the same legal consequences as a direct reliance by the depositors".

15. To the ruling (2), made on page 27 of the report "that the bonds and 'endorsements' in suit are binding obligations of the Surety Company in spite of the limitations on Cliff's authority contained in the 'Letter of Instructions' and in spite of the fact that the bonds were written without premium, unless Ragan's knowledge of those infirmities binds the receiver".

16. To the ruling on page 27 of the report that there was sufficient consideration to support the "endorsements" as contracts.

17. To the finding and ruling on page 27 of the report that the bank forebore from suing on the bonds, and that this is a sufficient *quid pro quo* to support the "endorsements" as contracts.

18. To the ruling (4), on page 32 of the report, "that the bonds and 'endorsements' in suit are binding obligations in the hands of the receiver due to the fact that he represents the Bank's creditors".

19. To the ruling and implied finding of the master, that Cliff gave the bonds to deceive creditors, involved in the statement on page 32 of the report:

> "If the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover on the bonds",

followed on page 36 of the report by the statement:

"If, then, the Surety Company by authorized agents had done what Cliff did, it would be liable."

20. To the statement of the master at the bottom of page 36 of the report that: "Anyone can see that such a procedure invites misuse of the equipment thus provided."

21. To the rulings on page 37 of the report that "the Surety Company is estopped to deny that the bonds and 'endorsements' are the effective instruments which they appeared to be", and that Ragan's knowledge does not affect the receiver.

22. To the ruling (5) on page 40 of the report "that the 'releases' given by Ragan and the statement that the bonds would not be enforced do not relieve the Surety Company of liability on the bonds to the receiver".

23. To the ruling (7) on page 41 of the report "that the new notes given by Cronin and Robinson upon and after the maturity of existing notes were 'extensions' and 'extensions or renewals' of the original Cronin and Robinson notes within the meaning of the Cronin and Robinson bonds and endorsements".

24. To the ruling (8) on page 42 of the report "that Stone's present obligation to the bank and the receiver is the 'obligation in the sum of $52,000.' referred to in the Stone bond, and that the obligation referred to in the Stone bond has not been paid or discharged by any new notes which Stone gave to the bank as other notes matured".

25. To the ruling (9) on page 42 of the report "that the giving of notice of default within ten days was not a condition precedent to recovery under any of these bonds and that, there being no evidence of damage to the company from such delay as may have existed, the company has no defense based upon the requirement of notice".

26. To the finding and ruling (10) on page 46 of the report "that the bank gave notice of default to the Surety Company as required by the Cronin bond".

27. To the rulings on pages 48 and 49 of the report "that the 'endorsements' of the Cronin bond are amendments to the original contract of suretyship and hence new contracts executed by Cliff and that

they fall within the terms of his authority as stated in his power of attorney", and "that the word 'default' in the suretyship contract as thus amended means the failure of Cronin to pay, on November 3, 1932, the full amount due upon the original note of $20,000 or any renewal or extension thereof", that the notice of default given on November 4, 1932, "complied with the requirement of notice", and that the facts stated "do not show non-compliance with the requirement of notice of default in the (Cronin) bond as amended by the endorsements".

28. To the finding and ruling (11) on pages 49, 50 of the report "that the notice of default required by the Westchester bond as amended by the endorsements, was given".

29. To the ruling on page 50 of the report that the endorsements constituted contracts.

30. To the ruling on page 52 of the report that the words "four months from date hereof" in the Robinson bond are to be disregarded.

31. To the wording of the finding on page 54 of the report that the Surety Company claims that the election by the receiver "absolves the Surety Company from liability", the Surety Company's claim being, not that the Surety Company is absolved, but that the receiver is barred, because it is unconscionable that he should recover in one case upon the sworn statement that the bonds were fraudulent and uncollectable, and, after obtaining a judgment in his favor on that claim, that he should then be heard in the same court to make the opposite claim as a basis of further recovery.

32. To the ruling of law on page 61 of the report "that there has been no election of remedy which is a defense to the receiver's claims in the present litigation".

33. To the ruling on page 62 of the report that "the receiver never disaffirmed these bonds or any obligation of the Surety Company which they may create".

34. To the ruling on page 62 of the report that "the remedy of the receiver, against the F. & D. was not inconsistent with his remedy against the Surety Company".

35. To the ruling on page 62 of the report "that the F. & D. was

in the position of a sub-surety with reference to these notes and bonds".

36. To the ruling on page 63 of the report that the receiver's allegations in the notices and proofs of loss "that these bonds were fraudulent, invalid and uncollectable", "were conclusions of law, uttered for the sole purpose of giving the F. & D. notice of the claims against it", and "that these conclusions did not indicate an intention to disaffirm the bonds".

37. To the ruling on page 63 of the report that the Surety Company has not been harmed by the receiver's notice and proof of claim against the F. & D.

38. To the ruling on page 63 of the report that the fact that the Surety Company was a re-insurer of the F. & D.'s obligations and that counsel for the receiver knew this fact is immaterial.

39. To the admission in evidence, over the Surety Company's objection, and subject to its exception, of evidence as to the agreement of settlement between the receiver and the F. & D.

40. To the conclusions, stated on page 66 of the report, "that all of these bonds are binding obligations on the Surety Company and that there is therefore no ground upon which they can be cancelled", and that the Surety Company is indebted to the receiver in the amounts and upon the bonds therein named.

41. To the recommendation that as to the prayers of the Surety Company all bills in equity should be dismissed; that in the three cases named a decree should be entered ordering the Surety Company to pay to the receiver the amounts specified; and that in the law cases numbered 5316 and 5317 judgment should be entered for the plaintiff in the amounts specified.

STANDARD SURETY & CASUALTY COMPANY
OF NEW YORK,
by their Attorneys,
FREDERIC H. CHASE,
RAYMOND P. BALDWIN.

This cause was thence continued to the September Term, A. D. 1935, when, to wit, October 10, 1935, said cause was set down for hearing on the above exceptions to report of auditor and master, the Honorable Hugh D. McLellan, District Judge, sitting.

Said cause was thence continued under advisement to the present March Term, A. D. 1936, when, to wit, March 18, 1936, a memorandum in connection with exceptions to master's and auditor's report is filed ruling that the exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver be sustained and that all other exceptions of both parties be overruled; that judgment be entered for the defendant in law actions Nos. 5225, 5316 and 5317 and that decrees for the cancellation of the bonds and the dismissing of the counterclaims be entered.

On the twenty-third day of March, A. D. 1936, the following Memorandum and Order is filed:

MEMORANDUM AND ORDER.

March 23, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

McLELLAN, J. Whereas, on March 18, 1936, a memorandum of decision applicable to the above-entitled law actions, and also to certain suits in equity between the same parties, was entered, and the plaintiff in the above law actions now seeks an opportunity for the taking of exceptions in the course of the trial of these actions, and the court is desirous that such an opportunity shall be afforded to him, it is ordered, as follows:

The order of March 18, 1936, overruling the plaintiff's and defendant's exceptions to the master's and auditor's report and ordering judgment for the defendant in the law actions, so far only as said order applies to the law actions, is vacated and set aside, and the trial of these cases continued to 12:30 P. M. this day.

On the twenty-third day of March, A. D. 1936 the following Memorandum and Order is entered overruling plaintiff's exceptions to the master's and auditor's report, plaintiff's exception thereto saved and to the ruling of the court that the action could not be main-

tained; defendant's exceptions to the master's and auditor's report to be overruled so far as they relate to the law actions except as indicated in the order of March 18, 1936, defendant's exception thereto being saved and judgment to be entered for the defendant.

MEMORANDUM AND ORDER.

March 23, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

McLELLAN J. At 12:30 P. M. on this twenty-third day of March, 1936, a continued hearing of the above law actions was held.

Subject to the plaintiff's exception, I overruled the plaintiff's exceptions to the master's and auditor's report, and subject also to the plaintiff's exception, I ruled that the above actions could not be maintained.

Subject to the defendant's exception, I overruled the defendant's exceptions to the master's and auditor's report, so far as they relate to the above law actions, except as indicated in the order of March 18, 1936, on file.

Let judgment be entered for the defendant in each of the above-entitled actions.

On the twenty-ninth day of April, 1936, the following stipulation *re* incorporating master's and auditor's report by reference into the bill of exceptions is filed:

STIPULATION.

April 29, 1936.

Law No. 5225, Law No. 5316, Law No. 5317.

In the above-entitled actions it is stipulated and agreed that the master's and auditor's report filed on June 6, 1935, may be incorporated by reference into the bills of exceptions of the respective parties, and made a part of the record in said cases.

GOODWIN, PROCTER & HOAR,

Attorneys for the Plaintiff.

STEWART & CHASE,

Attorneys for the Defendant.

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following Defendant's Motion for the Entry of Judgment is filed by consent and allowed by the court:

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.
[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
by FREDERIC H. CHASE.
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

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MEMORANDUM.
March 18, 1936.

Equity No. 3849, Equity No. 3850, Equity No. 3851, Equity No. 3852.
Law No. 5225, Law No. 5316, Law No. 5317.

MCLELLAN, J. These seven cases were referred to W. Barton Leach, Esquire, as master and auditor. By stipulation, his findings of fact as auditor are final.

As stated by the master and auditor, these seven cases raise the question whether the Standard Surety & Casualty Company of New York is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical.

The facts appear in the master's and auditor's report and need not be repeated here. Upon these facts the bonds did not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank. The master's and auditor's view that they were enforceable by the receiver is persuasive and sustained by authorities in several jurisdictions. These cases are cited and discussed in the report. See also *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245. But I feel bound by *Rankin* v. *City National Bank*, 208 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank. In *McCandless, Receiver,* v. *Furlaud et als.,* 296 U. S. 140, decided by the Supreme Court of the United States on November 11, 1935, since the filing of the master's and auditor's report, a majority of the court declined to consider whether the receivership corporation would have been entitled to the relief afforded in that case to the receiver. The minority opinion of the four dissenting judges, written by Mr. Justice Roberts, is consistent with the view expressed in the *Rankin* case.

The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained, and all other exceptions of both parties are overruled.

In the law actions, Nos. 5225, 5316 and 5317, judgment is to be entered for the defendant.

In the equity suits, Nos. 3849, 3850, 3851 and 3852, decrees for the cancellation of the bonds and dismissing the counterclaims are to be entered.

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936 and allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety and Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $40,000, executed by Standard Surety and Casualty Company of New York by its attorney-in-fact, Percy G. Cliff. This bond purports to guarantee an obligation of Westchester Discount Corporation. The writ and declaration were filed June 28, 1932. The amount claimed is $40,000 with interest from December 20, 1931.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5316 and 5317, and four bills in equity brought by Standard Surety and Casualty

Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered Equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered Law 5316 and 5317. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed his report containing his findings of fact and conclusions of law.

Mr. Leach filed one report which was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Robinson bond (Law No. 5316), Stone bond (Law No. 5317) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On June 14, 1935, the receiver filed one exception to the auditor's

report excepting to the ruling of law of the auditor that the receiver could not recover on the Westchester bond or endorsements thereof.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties, and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honorable Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific ref-

erence to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

Rulings and Conclusions of Law Excepted to by the Plaintiff.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and could not have been enforced by the Boston-Continental National Bank."
2. "But I feel bound by *Rankin* v. *City National Bank,* 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted, on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Overruled the plaintiff's exception to the auditor's conclusion that the Westchester bond could not be enforced.
3. Ordered judgment to be entered for the defendant in each of the three law actions.

A.

PLAINTIFF'S EXCEPTION TO AUDITOR'S RULING OF LAW DENIED BY THE COURT.

Now comes the plaintiff in the above-entitled cause and files the following exceptions to the report of the auditor filed herein on June 6, 1935, to wit:

1. To the ruling of the auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements". (Auditor's report, pages 40, 41 and 49.)

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;
(b) To the refusal of the court to sustain the exception of the plaintiff to the auditor's legal conclusion above set forth;
(c) To the orders for judgment for the defendant;

and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

Now comes the plaintiff in the above-entitled case and moves that, for the purposes of the record on appeal herein, said case be forthwith consolidated with the companion cases tried herewith in this court entitled and numbered respectively as follows:

Law No. 5316.

Frederick S. Deitrick as he is Receiver of Boston Continental National Bank

v.

Standard Surety & Casualty Company of New York.

Law No. 5317.

Frederick S. Deitrick as he is Receiver of Boston Continental National Bank

v.

Standard Surety & Casualty Company of New York.

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank, Frederick S. Deitrick, Receiver of Boston Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

And that to make said consolidation effective, and to carry out the purposes thereof, a single petition for appeal be filed, and a single record on appeal be printed covering all of said cases.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

We assent to the allowance of the above motion.

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN,
Attorneys for Standard Surety & Casualty Company of New York.

June 18, 1936. Allowed

HUGH D. MCLELLAN,
District Judge.

From the final judgments, entered in the three law actions, numbered respectively 5225, 5316 and 5317, and the final decrees entered in the four equity actions, numbered, respectively, 3849, 3850, 3851 and 3852, the receiver of the Boston-Continental National Bank, Frederick S. Deitrick, claims an appeal to the United States Circuit Court of Appeals for the First Circuit on the eleventh day of September, 1936, and said appeal is allowed by the court on the same day.

RECEIVER'S ASSIGNMENT OF ERRORS.

[Filed September 11, 1936.]

No. 5225 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick as he is Receiver of Boston-Continental National Bank

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

Now comes Frederick S. Deitrick as he is receiver of the Boston-Continental National Bank and, in connection with his petition for appeal in the above-entitled actions (consolidated for the purpose of appeal), makes the following assignment of errors, which he states occurred upon the trial of the cases in the United States District Court for the District of Massachusetts, to wit:

1. In the three actions at law, numbered respectively 5225, 5316 and 5317, the court erred in entering judgment for the defendant upon the facts found.

2. In the four causes in equity, numbered respectively 3849, 3850, 3851 and 3852, the court, upon the facts found, erred in entering final decrees declaring the several bonds and endorsements referred to in said decrees to be void and unenforceable, and enjoining said receiver and said Boston-Continental National Bank from enforcing the same.

3. In the four causes in equity, numbered respectively 3849, 3850, 3851 and 3852, the court, upon the facts found, erred in entering final decrees dismissing said receiver's counterclaim in each case.

4. The court, upon the facts found, erred in ruling as follows:

(a) "Upon these facts the bonds do not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank."

(b) "I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."

(c) "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained . . . ",

(d) That the actions at law, numbered 5225, 5316 and 5317, could not be maintained.

5. In action at law numbered 5225 and in equity case numbered 3851 the court, upon the facts found, erred in overruling the receiver's exception to rulings of the master and auditor that the Westchester bond dated December 20, 1930, and "endorsements" do not

secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements".

6. The court, upon the facts found, erred in ruling that if the Boston-Continental National Bank could not recover on the bonds and endorsements in suit the receiver of the Boston-Continental National Bank could not recover.

Wherefore the receiver prays that the judgment of the District Court may be reversed.

By his Attorneys,

GOODWIN, PROCTER & HOAR.

A citation on appeal was issued on the eleventh day of September, A. D. 1936, on behalf of Frederick S. Deitrick, as receiver, in the three law cases, numbered 5225, 5316 and 5317, and in the four equity cases, numbered 3849, 3850, 3851 and 3852, said citation being made returnable in the United States Circuit Court of Appeals on October 13, 1936. Service of said citation was duly acknowledged.

No. 5316 LAW DOCKET.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver), Plaintiff,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organ-

ized by law and having an usual place of business in Boston, Suffolk County, Massachusetts, to the value of thirty thousand dollars, and summon the said defendant (if it may be found in your District) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the second Tuesday of September next: then and there, in our said Court, to answer unto John B. Cunningham, as he is receiver of Boston-Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff

To the damage of the said plaintiff (as he says) the sum of thirty thousand dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of thirty thousand dollars aforesaid, which can be come at to be attached; but has entrusted to, and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law and having an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said Court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston, and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the eleventh day of August in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk,*
by EDITH G. ROLLINS, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,

MASSACHUSETTS DISTRICT, ss. BOSTON, August 16, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named Standard Surety and Casualty Company of New York, And thereafter on the same day at 1:59 P. M. I summoned the within named The First National Bank of Boston, to appear at court as within directed, by giving in hand to B. D. Blaisdell, cashier, and in charge of its business thereof at Boston, in said District, a true and attested copy of the within Writ, and thereafter on the same day I summoned the within defendant, Standard Surety & Casualty Company of New York, to appear at court and answer as within directed by giving in hand to Merton L. Brown, Commissioner of Insurance for the Commonwealth of Massachusetts, duplicate copies of this writ, together with $2 his statutory fee for acceptance of service.

WILLIAM J. KEVILLE, *United States Marshal.*

by JOHN J. CARENS; *Deputy.*

The writ in this cause was duly entered at the September Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 13, 1932, the following Declaration was filed:

DECLARATION.

[Filed September 13, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, in said District, a written instrument or bond, copy whereof, is hereto annexed marked "A" and

hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Boston-Continental National Bank the sum of $20,000 in the event that Gordon A. Robinson of Boston in said District, failed to make full and true payment to said Boston-Continental National Bank of note in the amount of $20,000 described in said bond; that the condition of said bond has been broken, in that Gordon A. Robinson, the principal named therein, has not paid the note described in said bond, according to its terms, except the sum of $1,003.15, and has not made such payment on or before July 8, 1932, but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said note; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the defendant on account of the default of said Gordon A. Robinson are in excess of $20,000.

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from July 8, 1932.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

A.

No. 12420-31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as Principal, and the Standard Surety and Casualty Company of New York,

a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000.00), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON.
D/B as Robinson Engineering Co.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
by Percy G. Cliff, Attorney-in-fact [SEAL]

At the same term, to wit, September 14, 1932 the following Answer of Trustee was filed:

TRUSTEE'S ANSWER.

[Filed September 14, 1932.]

[MEMORANDUM. Copy of trustee's answer is here omitted as it is identical with the one already printed in case No. 5225 Law, on page 10 of this volume with the exception of the phrase "subject to previous trustee attachment" appearing following the figures "$320.21" and preceding the word "and". JAMES S. ALLEN, *Clerk.*]

This cause was thence continued from term to term to the March term, A. D. 1933, when, to wit, May 4, 1933, the following Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston-Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that, prior to the date of the writ in this action, said Boston-Continental National Bank executed and delivered to said Cliff a release under seal, whereby for

the consideration therein expressed said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.

[Filed December 6, 1934.]

Now comes the defendant, Standard Surety & Casualty Company of New York, in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case, the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant; and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above-entitled action and agree that entries may be made of "judgment for the plaintiff for $100,000 without costs" and "judgment satisfied".'

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has

elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

At the same term, to wit, December 10, 1934, said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

MCLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. MCLELLAN,

District Judge.

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the master's and auditor's report are the same as those already printed on pages 25–129 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Defendant's Exceptions were filed:

DEFENDANT'S EXCEPTIONS TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. See defendant's exceptions to report of master and auditor as printed on pages 130–136 in the case numbered 5225 Law. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the stipulation filed April 29, 1936, are the same as those already printed on pages 137, 138 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following defendant's Motion for the Entry of judgment is filed by consent and allowed by the court:

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.

[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

MEMORANDUM.

March 18, 1936.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936 and allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety and Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $20,000, executed by Standard Surety and Casualty Company of New York by its attorney-in-fact, Percy G. Cliff. This bond purports to guarantee an obligation of Gordon A. Robinson. The writ and declaration were filed September 13, 1932. The amount claimed is $14,403.53 with interest from August 10, 1932.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5225 and 5317, and four bills in equity brought by Standard Surety and Casualty Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered Equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety

Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered Law 5225 and 5317. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed a report containing his findings of fact and conclusions of law. This was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Westchester bond (Law No. 5225), Stone bond (Law No. 5317) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the

auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honorable Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific reference to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

Rulings and Conclusions of Law Excepted to by the Plaintiff.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and

could not have been enforced by the Boston-Continental National Bank."

2. "But I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted, on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions, was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Ordered judgment to be entered for the defendant in each of the three law actions.

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;

(b) To the orders for judgment for the defendant; and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it will be found printed on pages 146, 147 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk*.]

No. 5317, LAW DOCKET.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver) Plaintiff,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE, Defendants.

WRIT.

UNITED STATES OF AMERICA.

[SEAL] MASSACHUSETTS DISTRICT, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods and estate of Standard Surety & Casualty Company of New York, a corporation duly organized by law and having an usual place of business in Boston, Suffolk County, Massachusetts, to the value of seventy-five thousand dollars, and summon the said defendant (if it may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our District of Massachusetts, on the second Tuesday of September next: then and there, in our said court, to answer unto John B. Cunningham, as he is receiver of Boston-Continental National Bank, a national banking association duly organized by law and having an usual place of business in said Boston, plaintiff.

To the damage of the said plaintiff (as he says) the sum of seventy-five thousand dollars, which shall then and there be made to

appear with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession, goods and estate to the value of seventy-five thousand dollars aforesaid, which can be come at to be attached; but has entrusted to and deposited in the hands and possession of The First National Bank of Boston, a national banking association duly organized by law and having an usual place of business in said Boston, trustee of the said defendant's goods, effects, and credits, to the said value: We command you, therefore, that you summon the said The First National Bank of Boston (if it may be found in your district) to appear before our judge of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects, or credits, in the hands and possession of the said The First National Bank of Boston, and have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, at Boston, the eleventh day of August in the year of our Lord one thousand nine hundred and thirty-two.

JAMES S. ALLEN, *Clerk*,
by EDITH G. ROLLINS, *Deputy Clerk*.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, August 16, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named Standard Surety and Casualty Company of New York, and thereafter on the same day at 1:58 P. M. I summoned the within named The First National Bank of Boston, to appear at court as within directed, by giving in hand to B. D. Blaisdell, Cashier, and in charge of its business thereof at Boston, in said district, a true and attested copy of the within writ, and thereafter on the same day I summoned the within defendant Standard Surety & Casualty Company of New York to appear at court and answer as within directed by giving in hand to Merton L. Brown, Commissioner of Insurance

for the Commonwealth of Massachusetts, duplicate copies of this writ, together with $2, his statutory fee for acceptance of service.

W. J. KEVILLE, *United States Marshal,*
by JOHN J. CARENS, *Deputy United States Marshal.*

The writ in this cause was duly entered at the September Term of this court, A. D. 1932, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 13, 1932, the following Declaration was filed:

DECLARATION.

[Filed September 13, 1932.]

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931 he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay Boston-Continental National Bank the sum of $52,000 in the event that Joseph Stone, of Brockton in said District, failed within one year from the date of the bond, to wit, June 2, 1931, to make full and true payment to the Boston-Continental National Bank of an obligation in the sum of $52,000; that the condition of said bond as aforesaid has been broken, in that Joseph Stone, the principal named therein, has not paid the obligation described in said bond, according to its terms, except the sum of $237.31, but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said obligation; that the defendant was duly notified of the default in accordance with the provisions of the bond;

that the damages sustained by the defendant on account of the default of said Joseph Stone are in excess of $52,000.

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from June 2, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

A.

No. 9485-31 6/2/32 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety

Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

by Percy G. Cliff Attorney-in-fact.

This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, May 4, 1933, the following Defendant's Answer was filed late by consent:

DEFENDANT'S ANSWER.

[Filed by consent May 4, 1933.]

Now comes the defendant in the above-entitled cause without waiving its bill in equity heretofore filed and now pending before this Honorable Court, and for answer to the plaintiff's declaration says:

1. The defendant denies all the allegations in the plaintiff's declaration.

2. Further answering the defendant says that if any written instruments such as alleged in the declaration purporting to be executed in the name of the defendant by Percy G. Cliff as attorney-in-fact, have come into the hands of the plaintiff, the same were executed by said Cliff at the request and solicitation of said Boston-Continental National Bank without authority from this defendant as said bank well knew, without any consideration or security, without premiums charged or paid or intended to be charged or paid therefor, upon the understanding between said bank and said Cliff that said instruments were not binding obligations of the defendant, that the defendant should never be informed of the existence thereof, and that after remaining in the custody of said bank for a short time they should be returned to said Cliff.

3. And for further answer the defendant says that prior to the date of the writ in this action, to wit, on or about June 4, 1931, said Boston-Continental National Bank executed and delivered to said Cliff a release dated June 4, 1931, a copy of which is hereto annexed, whereby for the consideration therein expressed said bank discharged the claim sued upon in this action.

By its Attorneys,

STEWART & CHASE.

RELEASE.

Whereas, on the second day of June, nineteen hundred thirty-one, Joseph Stone, of Brockton in the County of Plymouth and the Commonwealth of Massachusetts, as Principal and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, did execute a bond to the Boston Continental National Bank, wherein the said Joseph Stone as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Boston Continental National Bank in the sum of fifty-two thousand dollars ($52,000.00) to be paid to said Boston Continental National Bank in the event that the said Joseph Stone should not, within one year from the date hereof, fully pay and discharge to the said Boston Continental National Bank, the sum of fifty-two thousand dollars ($52,000.00).

And whereas said Joseph Stone has fully paid and discharged his obligation, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Boston Continental National Bank, receipt of which is hereby acknowledged, said Boston Continental National Bank does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with said Bond.

In witness whereof, said Boston Continental National Bank has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this fourth day of June, nineteen hundred and thirty-one.

BOSTON CONTINENTAL NATIONAL BANK
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Witness.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, December 6, 1934, the following Motion to Amend Defendant's Answer was filed:

MOTION TO AMEND DEFENDANT'S ANSWER.
[Filed December 6, 1934.]

Now comes the defendant Standard Surety & Casualty Company of New York in the above-entitled action and moves to amend its answer by inserting therein, after paragraph 3 thereof, the following:

"4. And for further answer, and as a bar to the plaintiff's action, the defendant says that subsequent to the filing of the defendant's original answer in this case, the plaintiff brought an action against Fidelity & Deposit Company of Maryland (No. 5498 Law) and there declared upon certain Bankers Blanket Bonds. The remedy sought by the plaintiff in said case against Fidelity & Deposit Company of Maryland was based upon the theory of his disaffirmance of the instrument upon the affirmance of which he seeks to recover from the defendant in the case at bar, the plaintiff there contending that said instrument was invalid and uncollectible as against this defendant, and said remedy and the theory upon which it was based, and said disaffirmance of said instrument were inconsistent with the remedy here sought. Said action by the plaintiff against said Fidelity & Deposit Company of Maryland was subsequently prosecuted and tried upon said inconsistent theory of disaffirmance, and on October 10, 1934, the parties there filed the following agreement for judgment:

> 'And now come the parties in the above entitled action and agree that entries may be made of "judgment for the Plaintiff for $100,000 without costs" and "Judgment Satisfied".'

Pursuant to said agreement judgment was entered for the plaintiff in said action in the amount of $100,000. Wherefore the defendant says that the plaintiff, by prosecuting said action to judgment, has elected its remedy against Fidelity & Deposit Company of Maryland on the theory of his disaffirmance of the instrument theretofore declared upon by the plaintiff in this action, and that the plaintiff is barred by said election from recovery against the defendant in the case at bar on the inconsistent theory of the affirmance of said instrument; and that judgment herein should therefore be entered for the defendant."

By its Attorneys,

STEWART & CHASE.

At the same term, to wit, December 10, 1934, said cause came on to be heard on the motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and the following Order of court allowing said motion was entered:

ORDER.

December 10, 1934.

December 10, 1934.

McLELLAN, J. Without any intimation whatever as to the validity or invalidity of the alleged defence sought to be set up in the amendment, the within motion to amend defendant's answer is allowed.

HUGH D. McLELLAN,

District Judge.

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the master's and auditor's report are the same as those already printed on pages 25–129 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Defendant's Exceptions to Auditor's Report was filed:

DEFENDANT'S EXCEPTIONS TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. See defendant's exceptions to report of master and auditor as printed on pages 130–136 in the case numbered 5225 Law. . JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals down to and including the stipulation filed April 29, 1936, are the same as those already printed on pages 137, 138 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the thirtieth day of April, A. D. 1936, draft bills of exceptions are filed by the plaintiff and the defendant within extended time.

On the third day of June, A. D. 1936, the following Trustee's Answer is filed late by consent:

TRUSTEE'S ANSWER.

[Filed by consent June 3, 1936.]

[MEMORANDUM. Copy of trustee's answer is here omitted as it is identical with the one already printed in case No. 5225 Law, on page 10 of this volume with the exception of the phrase "subject to previous trustee attachment appearing following the figures $320.-21" and preceding the word "and". JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the aforementioned plaintiff's and defendant's bills of exceptions are allowed by the court, the Honorable Hugh D. McLellan, District Judge, sitting.

On the said eighteenth day of June, A. D. 1936, the following Defendant's Motion for the Entry of Judgment is filed by consent and allowed by the court.

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT.

[Filed and allowed June 18, 1936.]

Now comes the defendant Standard Surety & Casualty Company

of New York and moves that judgment for this defendant be entered forthwith.

By its Attorneys,

STEWART & CHASE,
FREDERIC H. CHASE,
RAYMOND BALDWIN.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

Thereupon, to wit, June 18, 1936, it is considered by the court, the Honorable Hugh D. McLellan, District Judge, sitting, that Standard Surety & Casualty Company of New York, defendant, recover of the said Frederick S. Deitrick, receiver of the Boston-Continental National Bank, its costs of suit taxed at

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MEMORANDUM.

March 18, 1936.

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed April 30, 1936, Allowed June 18, 1936.]

This action is brought by the present receiver of the Boston-Continental National Bank against the Standard Surety & Casualty Company of New York to recover on a bond purporting to be executed by the Surety Company.

The successive receivers of the Boston-Continental National Bank have been John B. Cunningham, James H. Brennan and Frederick S. Deitrick. At the time suit was brought John B. Cunningham was receiver. Subsequent receivers have been substituted as parties from time to time. All formalities with respect to such substitution have been complied with. All of the pleadings may be referred to and are made a part hereof by reference.

DESCRIPTION OF THE CASE.

This is a suit by a receiver of a national bank to recover on a bond in the amount of $52,000, executed by Standard Surety & Casualty

Company of New York by its attorney-in-fact, Perry G. Cliff. This bond purports to guarantee an obligation of Joseph Stone. The writ and declaration were filed September 13, 1932. The amount claimed is $52,000 with interest from July 30, 1932.

PROCEDURAL HISTORY.

The parties in this case, by their attorneys of record, filed with the clerk a written stipulation waiving trial by jury and agreeing that this case could be tried simultaneously with two other actions at law pending between the same parties and numbered Law 5225 and 5316, and four bills in equity brought by Standard Surety and Casualty Company of New York against Boston-Continental National Bank, its receivers and others, pending in this court and numbered equity 3849, 3850, 3851 and 3852.

The four equity actions above referred to were suits by the Surety Company seeking the cancellation and surrender of four bonds, all written under similar circumstances, running to the Boston-Continental National Bank, and purporting to guarantee the obligations to that bank of four separate persons. In those equity actions the receiver counterclaimed upon the bond in each case. Actions at law were brought on three of the bonds which are the subject of the equity actions, one law action being the one here under consideration, and the other two being numbered law 5225 and 5316. By order of the court entered February 4, 1935, and without objection of either party, all three of the law cases were referred to W. Barton Leach as auditor, with instructions to report to the court his findings of fact and conclusions of law; said findings of fact to be final. At the same time all four of the equity cases, by consent of the parties, were referred to Mr. Leach as master, with instructions to make findings of fact and conclusions of law in accordance with the equity rules. Extended hearings were had before the auditor, and after the conclusion thereof both parties presented in writing to the auditor requests for findings of fact and rulings of law. Before filing his final report the auditor submitted to each party a draft report, and received in writing from each party further suggestions with respect to the findings of fact and rulings of law.

On June 6, 1935, the auditor filed a report containing his findings of fact and conclusions of law. This was a combined auditor's and master's report, and accordingly it contains findings of fact and conclusions of law dealing with the so-called Westchester bond (Law No. 5225) Robinson bond (Law No. 5316) and Cronin bond (not made the subject of an action at law).

On June 26, 1935, the defendant in this action filed forty-one exceptions to the combined report of the master and auditor.

On October 10, 1935, the case was argued by counsel before the court, but neither party at that time or subsequently presented to the court further requests for rulings of law.

On March 18, 1936, the court handed down a memorandum in the absence of counsel adopting the findings of fact by the auditor and overruling all exceptions to the auditor's report taken by both parties, except all exceptions of the defendant to the legal conclusion of the auditor that the bond was enforceable by the receiver and judgment for the defendant was ordered to be entered.

On March 23, 1936, the court, at the request of the plaintiff, vacated and set aside the order of March 18, 1936, in so far as the same dealt with the law actions, in order to give the plaintiff an opportunity to take exceptions in the course of the trial of these cases. Subsequently on the same day, in the presence of counsel for both parties, and subject to the plaintiff's exception, the court ruled that the three law actions could not be maintained by the receiver, and overruled the plaintiff's single exception to the legal conclusion of the auditor that the receiver could not recover on the Westchester bond, and subject to the defendant's exception the court overruled all exceptions of the defendant to the auditor's report, except those taken to the legal conclusion of the auditor that the bonds were enforceable by the receiver.

Statement of Facts.

All of the facts necessary to the consideration of this case have been specially found by the auditor, concisely and in detail, and specifically set forth, together with exhibits and all other matters pertinent thereto, in a report which has been filed with this Honor-

able Court. These findings of fact are made in connected narrative form, and are plainly segregated in the report from the conclusions of law drawn therefrom by the auditor. These findings of fact by the auditor are final by stipulation, and having been adopted by the court are special findings forming part of the record. Specific reference to the entire auditor's report is hereby made, and the same in its entirety as filed is hereby specifically incorporated herein by reference and may be referred to.

RULINGS AND CONCLUSIONS OF LAW EXCEPTED TO BY THE PLAINTIFF.

A memorandum filed by the court on March 18, 1936, contained the following rulings of law:

1. "Upon these facts the bonds do not constitute valid obligations of the Standard Surety and Casualty Company and could not have been enforced by the Boston-Continental National Bank."
2. "But I feel bound by *Rankin* v. *City National Bank,* 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."
3. "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained and all other exceptions of both parties are overruled."
4. "In the law actions numbered 5225, 5316 and 5317 judgment is to be entered for the defendant."

As above noted on March 23, 1936, the order of March 18, 1936, in so far as it deals with the law actions was vacated and set aside, and on the same day the court

1. Ruled that the law actions could not be maintained.
2. Ordered judgment to be entered for the defendant in each of the three law actions.

PLAINTIFF'S EXCEPTIONS.

The plaintiff during the course of the trial, and within the time required by law and the rules of this Honorable Court, duly excepted

(a) To the rulings of law made by the court above set forth;

(b) to the orders for judgment for the defendant;

and all of said exceptions were duly saved by the court, and the plaintiff being aggrieved by these several rulings and orders for judgment, which were the subject of said exceptions, brings this bill of exceptions, and prays that it may be allowed.

By his Attorneys,

GOODWIN, PROCTER & HOAR,
SAMUEL HOAR,
RICHARD M. NICHOLS.

June 18, 1936. Allowed.

HUGH D. MCLELLAN,
District Judge.

PLAINTIFF'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it will be found printed on pages 146, 147 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

No. 3849, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff,

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

[L. S.] SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know ye, that among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank and Joseph Stone, Defendants

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Joseph Stone is a resident of Brockton in the County of Plymouth in said Commonwealth.

3. The plaintiff is informed and believes and therefore avers that on or about June 2nd, A. D. 1931 the defendant Joseph Stone and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof.

4. The plaintiff is informed and believes and therefore avers that the instrument aforesaid marked A. was executed by said Cliff at the request and solicitation of the defendants without any considera-

tion or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instrument was not a binding obligation of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instrument would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time it should be returned to said Cliff.

5. The instrument above described copy of which is hereto annexed marked A was executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instrument which is now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instrument marked A, by suit or otherwise.

2. That the said instrument marked A be declared null and void and that the defendant bank be ordered to deliver it up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. 9485-31 $52,000.00

Know all Men by these Presents, That we, Joseph Stone of Brockton, Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking Corporation

duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of fifty-two thousand dollars ($52,000.00), to be paid to said Boston Continental National Bank as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank, full and true payment of an obligation in the sum of fifty-two thousand dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at 80 John Street, New York City, New York, within ten days by registered mail of such default and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid obligation of fifty-two thousand dollars ($52,000.00), said payment to be made by the Surety Company within thirty days after the receipt by the Surety Company of the notice of default.

Witness our hands and seals, and dated this 2nd day of June, A. D. 1931.

JOSEPH STONE [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

by Percy G. Cliff Attorney-in-fact.

B.

RELEASE.

Whereas, on the second day of June, nineteen hundred thirty-one, Joseph Stone, of Brockton in the County of Plymouth and the Commonwealth of Massachusetts, as Principal and the Standard Surety & Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, did execute a Bond to the Boston Continental National Bank, wherein the said Joseph

Stone as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Boston Continental National Bank in the sum of fifty-two thousand dollars ($52,000.00) to be paid to said Boston Continental National Bank in the event that the said Joseph Stone should not, within one year from the date hereof, fully pay and discharge to the said Boston Continental National Bank, the sum of fifty-two thousand dollars ($52,000.00).

And whereas said Joseph Stone has fully paid and discharged his obligation, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Boston Continental National Bank, receipt of which is hereby acknowledged, said Boston Continental National Bank does hereby forever discharge, release and hold harmless, the said Surety Company from any liaibility whatsoever under, or in connection with said Bond.

In witness whereof, said Boston Continental National Bank has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this fourth day of June, nineteen hundred and thirty-one.

BOSTON CONTINENTAL NATIONAL BANK
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Witness

This bill was entered and filed in our said Court on the twenty-third day of February A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

"Subp. ret. April issued".

. . . . . .

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39424

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Joseph Stone

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham Receiver of said defendant bank on December 22, 1931 and said Receiver duly qualified by filing bond in the amount of Four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such Receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, Receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the Bill of Complaint.

Second. The Court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a Receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Thence the suit was continued unto the fifth day of December,

1932, when on said day, the following rulings on pleas of defendants was handed down, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the Bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the Bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the Bank. The Bank is powerless in the matter. Looking at the cases

apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the Bank. An injunction against the Bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the Bank. The receiver and the Bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and though not obliged to assume their defence, will be bound by a decree against the Bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time.

The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville*, 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace*, 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank*, 206 Fed. Rep. 452. If the receiver can be

bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court

Subsequently on the ninth day of December, 1932, plaintiff's motion to join a party defendant and to amend Bill of Complaint was filed, as follows, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York Plaintiff

vs.

Boston Continental National Bank, and Joseph Stone Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its Bill of Complaint as follows:

1. By adding, in the heading thereto, after the name "Joseph Stone", and before the word "Defendants" the following:

"John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said Bill of Complaint the following:

"The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled," the words "and the defendant receiver."

By its Attorneys,
STEWART & CHASE,
JAMES T. CONNOLLY.

And on said twenty-fifth day of February, 1933, defendants' petition for removal of this suit to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your petitioners, Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the

jurisdiction of the Court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston, in said County; said Bank closed in the regular course of business on December 16, 1931, and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said Bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham, Receiver of said Bank and he duly qualified by executing bond for the faithful performance of his duties as such Receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Joseph Stone and while the affairs of said Bank were in the hands of said Receiver; that said Receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said Bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a Receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Joseph Stone filed in this Court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this Court on the ground that the Receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this Court.

3. Thereafter the defendant Boston-Continental National Bank filed by leave of Court a special plea to the bill on the ground that the Receiver of Boston-Continental National Bank was a necessary party defendant and that the Court had no jurisdiction to enter a decree as prayed for against said Bank. After hearing on said mo-

tion, this Court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is Receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this Court and process issued against John B. Cunningham, Receiver of Boston-Continental National Bank, returnable to this Court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $52,000 now held by John B. Cunningham as Receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoena served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pur-

suant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver.
JOHN M. MORRISON
SAWYER, HARDY, STONE & MORRISON,
Attys. for Joseph Stone.
JOHN B. CUNNINGHAM
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts.

Suffolk, ss. Feb. 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL, [SEAL]
Notary Public.

And on said twenty-fifth day of February 1933, the following Bond for Removal is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39424

Standard Surety & Casualty Company of New York
v.
Boston-Continental National Bank, Joseph Stone and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a

corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Joseph Stone and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Joseph Stone and John B. Cunningham, as he is Receiver of Boston-Continental National Bank are defendants to the District Court of the United States for the District of Massachusetts.

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its Receiver thereunto duly authorized, and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK [SEAL]
By John B. Cunningham Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-
Continental National Bank.

And the following are endorsed on said Removal Bond, to wit:

This bond may be approved. Stewart & Chase.

Feb. 25, 1933.

Bond accepted by the Court. (QUA, *J.*)

Attest: CLESSON S. CURTICE, Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

This petition may be allowed. Stewart & Chase.

Feb. 25, 1933.

Petition accepted by the Court. (QUA, *J.*)

Attest: CLESSON S. CURTICE, Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, ESQUIRE, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

FRANCIS A. CAMPBELL, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT. No. 39424.

DOCKET ENTRIES.

Standard Surety & Casualty Company of New York

vs.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent.
Stewart & Chase	1932 April 25 Goodwin, Procter &
1 Federal Street	Hoar, 84 State St.
	1933 Feb. 25, John M. Morrison–
	Sawyer Hardy Stone & Morrison
	33 Broad St. for Joseph Stone

Bill Entered Feb. 23, 1932. Subpoena returnable April issued.

Mar. 24, Subpoena returned (1)

Apr. 25, Defendants' petition for removal to District Court of United States of Massachusetts (2) accepted.

Apr. 25, Bond of removal (3).

1932 May 2, Copies prepared for District Court of the United States for the District of Massachusetts.

July 5, Remanded to State Court (4).

July 19, Motion of Boston-Continental National Bank leave to file plea reserving answer allowed (5).

July 19, Plea of Boston Continental National Bank (6).

Dec. 5, Rulings on pleas of defendants (Qua J.) (See paper No. 6 in No. 39422).

Dec. 9, Motion to join party defendant and to amend bill (7)

Dec. 19, Motion (paper No. 7) allowed and process ordered and subpoena returnable February and issued.

1933 Jan 10, Subpoena returned (8)

Feb. 25, Defendants' petition for removal to the District Court of the United States for District of Massachusetts (9) accepted.

Feb. 25, Removal Bond (10)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact; that if a purported release was delivered to said Cliff by Boston-Continental National Bank by T. M. Ragan, president, in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the Board of Directors of said Boston-Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A", has been broken in that Joseph Stone, the principal named therein, has not paid the obligation described in said instrument according to its terms, except the sum of $237.31, but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, to

payment in full of said obligation; that the plaintiff was duly notified of the default in accordance with the terms of said instrument; that the damages sustained by these defendants on account of the default of said Joseph Stone are in excess of $52,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed January 31, 1935.]

Now comes Frederick S. Deitrick and says that he was appointed by the Comptroller of the Currency, receiver of Boston-Continental National Bank on September 1, 1934, said appointment to take effect at the close of business on September 29, 1934, in place of James H. Brennan, resigned, who in turn succeeded John B. Cunningham, resigned, as receiver of said bank.

Wherefore he moves that he may be substituted as party defendant in this cause in place of said John B. Cunningham.

By his Attorneys,

MURRAY F. HALL,
GOODWIN, PROCTER & HOAR.

On the said thirty-first day of January, A. D. 1935, the foregoing motion was allowed by the court, the Honorable Elisha H. Brewster, District Judge, sitting, and Frederick S. Deitrick, receiver, was accordingly substituted as party defendant.

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

No. 3849, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Joseph Stone and Frederick S. Deitrick, Receiver.

No. 3850, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Arthur D. Cronin and Frederick S. Deitrick, Receiver.

No. 3851, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Westchester Discount Corporation and Frederick S. Deitrick, Receiver.

No. 3852, Equity.

Standard Surety & Casualty Company of New York

v.

Boston Continental National Bank and Gordon A. Robinson and Frederick S. Deitrick, Receiver.

McLELLAN, J. The above-entitled cases came on to be heard at this term upon defendant's motion for reference to a master, and upon consideration thereof, the court being satisfied that reference to a special master is necessary, and by agreement of parties, it is

Ordered, adjudged and decreed that the above-entitled cases be referred to W. Barton Leach, Esquire, of Weston, Massachusetts, as special master to hear the parties and their evidence, and to report to the court his findings of fact and his conclusions thereon in accordance with the equity rules.

It is further ordered that the special master proceed as expedi-

tiously as practicable; that he may sit anywhere within this district as he may determine, or elsewhere by consent of parties, and that said hearings shall begin on March 11, 1935, and be completed on or before April 1, 1935; that his compensation as special master in the above entitled cases and as auditor in law cases Nos. 5225, 5316 and 5317, between the same parties, shall be at the rate of seventy-five dollars per day; and that the compensation plus expenses and stenographer's fees of said master and auditor shall be paid equally from time to time by the parties and be taxed as costs against the losing party.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

February 4, 1935.

H. D. M.,

D. J.

Also at the same term, to wit, February 16, 1935, the following Notice of Frederick S. Deitrick, Receiver, to Admit Facts was filed:

NOTICE OF FREDERICK S. DEITRICK, RECEIVER TO ADMIT FACTS.

[Filed February 16, 1935.]

[MEMORANDUM. Copy of notice to admit facts is here omitted, as it already appears printed on pages 27–33 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

On the twenty-fifth day of said February, the following Answer to Receiver's Notice to Admit Facts was filed:

ANSWER OF STANDARD SURETY & CASUALTY COMPANY TO RECEIVER'S NOTICE TO ADMIT FACTS.

[Filed February 25, 1935.]

[MEMORANDUM. Copy of answer of Standard Surety & Casualty Company to receiver's notice to admit facts is here omitted, as it already appears printed on pages 34, 35 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

Now comes the plaintiff, Standard Surety & Casualty Company of New York, and moves to amend its bill of complaint by inserting therein after paragraph 5 the following:

"6. That the said Boston-Continental National Bank at the time of the appointment of said John B. Cunningham as receiver, was the obligee on certain 'Bankers Blanket Bonds' issued by the Fidelity & Deposit Company of Maryland, indemnifying said bank against the losses therein specified; that on or about April 28, 1932, said bank through its said receiver notified said Fidelity & Deposit Company, by letter dated April 28, 1932, that it claimed a right to recover from said Fidelity & Deposit Company of Maryland, on said 'Bankers Blanket Bonds', the face value of the instrument annexed to this bill of complaint and marked 'A', on the ground that said instrument, therein described as a bond of the Standard Surety & Casualty Company of New York, was fraudulent, invalid and uncollectible; that subsequent thereto and on or about June 2, 1932, said bank through its said receiver pursuant to the provision of said bonds and in order to recover thereon, filed with said Fidelity & Deposit Company a proof of claim under said bonds, subscribed and sworn to by its said receiver, by which said receiver sought to recover on said bonds on the theory that the instrument annexed to this bill of complaint and marked 'A' was fraudulent, invalid and uncollectible as stated by said receiver; that subsequently said receiver brought in this court an action against said Fidelity & Deposit Company of Maryland (5498 Law) in which he sought to recover on said 'Bankers Blanket Bonds' in accordance with said claims; and that the plaintiff in said action, who is the defendant in this suit, prosecuted said claims to judgment in said action, after receiving notice that the plaintiff herein was liable to said Fidelity & Deposit Company of Maryland as a re-insurer of the liability of said Fidelity & Deposit Company on said 'Bankers Blanket Bonds'.

Wherefore, as this plaintiff says, the defendant herein is barred from asserting any claim based upon a contrary and inconsistent contention that the instrument annexed to this bill of complaint and marked 'A' is valid and collectible."

By its Attorneys,

STEWART & CHASE,
RAYMOND BALDWIN.

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

No. 5225 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5316 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 5317 Law.

Frederick S. Deitrick, as he is Receiver of Boston-Continental National Bank,

v.

Standard Surety & Casualty Company of New York.

No. 3849 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

No. 3850 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

No. 3851 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

No. 3852 Equity.

Standard Surety & Casualty Company of New York,

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

EXHIBITS.

[MEMORANDUM. Copies of Master's and Auditor's Report and exhibits are here omitted, as they are identical with those printed on pages 42–129 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the June Term, A. D. 1935, when, to wit, June 26, 1935, the following Exceptions of the Standard Surety & Casualty Company to the Master's Report were filed:

EXCEPTIONS OF STANDARD SURETY & CASUALTY COMPANY TO REPORT OF MASTER AND AUDITOR.

[Filed June 26, 1935.]

[MEMORANDUM. Copy of exceptions of Standard Surety & Casualty Company to the Master's Report is here omitted, as it already appears printed on pages 130–136 of this volume in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the September Term, A. D. 1935, when, to wit, October 10, 1935, said cause was set down for hearing on the above exceptions to report of master and auditor, the Honorable Hugh D. McLellan, District Judge, sitting.

Said cause was thence continued under advisement to the present March Term, A. D. 1936, when, to wit, March 18, 1936, a memorandum in connection with exceptions to master's and auditor's report is filed, ruling that the exceptions of the Surety Company to the audi-

tor's and master's conclusion that the bonds are enforceable by the receiver be sustained and that all other exceptions of both parties be overruled and that decrees for the cancellation of the bonds and the dismissing of the counterclaims be entered.

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

McLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto, and the entry of a decree, and was argued by counsel; and thereupon upon consideration thereof it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond is enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936. H. D. M.,
D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond is void and unenforceable as against the plaintiff, and that the defendant Bank and

the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936. H. D. M.,
D. J.

MEMORANDUM.
March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225 Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.
[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225 Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF JOSEPH STONE.
[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to

the United States Circuit Court of Appeals, and move a severance from Joseph Stone, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

From the final decrees entered in the four equity cases, numbered respectively 3849 3850, 3851 and 3852, the Boston-Continental National Bank claims an appeal to the United States Circuit Court of Appeals for the First Circuit on the fifteenth day of September, 1936, and said appeal is allowed by the court on the same day.

BANK'S ASSIGNMENT OF ERRORS.

[Filed September 15, 1936.]

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

Now comes the Boston-Continental National Bank and, in connection with its petition for appeal in the above-entitled actions (consolidated for the purpose of appeal) makes the following assignment of errors, which it states occurred upon the trial of the cases in the United States District Court for the District of Massachusetts, to wit:

1. The court, upon the facts found, erred in entering final decrees declaring the several bonds and endorsements referred to in said decrees to be void and unenforceable, and enjoining said Boston-Continental National Bank and the receiver thereof from enforcing the same.

2. The court, upon the facts found, erred in entering final decrees dismissing the counterclaim in each case.

3. The court, upon the facts found, erred in ruling as follows:

(a) "Upon these facts the bonds do not constitute valid obligations of the Standard Surety & Casualty Company and could not have been enforced by the Boston-Continental National Bank."

(b) "I feel bound by *Rankin* v. *City National Bank*, 206 U. S. 541, which I regard as at present an imperative authority to the effect that the receiver stands no better than the bank."

(c) "The exceptions of the Surety Company to the auditor's and master's conclusion that the bonds are enforceable by the receiver are sustained . . . ."

4. In equity case numbered 3851, the court, upon the facts found, erred in overruling the exception of said bank and receiver to rulings of the master and auditor that the Westchester bond dated December 20, 1930 and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery upon this bond and "endorsements".

5. The court, upon the facts found, erred in ruling that if the Boston-Continental National Bank could not recover on the bonds and endorsements in suit the receiver of the Boston-Continental National Bank could not recover.

Wherefore the Boston-Continental National Bank prays that the judgment of the District Court may be reversed.

By its Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

PRAECIPE.

[Filed November 10, 1936.]

Equity No. 3849.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Joseph Stone.

Equity No. 3850.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Arthur D. Cronin.

Equity No. 3851.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Westchester Discount Corporation.

Equity No. 3852.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Frederick S. Deitrick, Receiver of Boston-Continental National Bank, and Gordon A. Robinson.

To the Clerk of the Above Named Court:

Please prepare a transcript of the record, pleadings, proceedings and papers in the above-entitled cases, consolidated for appeal with

law cases numbered 5225, 5316 and 5317, to be transmitted to the United States Circuit Court of Appeals for the First Circuit in the matter of the appeals of Boston-Continental National Bank and Frederick S. Deitrick, receiver, heretofore allowed herein, and include in such transcript copies of the following papers and proceedings, to wit:

In Case No. 3849 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant and rulings of the court on pleas.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver, to be substituted as party defendant, together with order of the court thereon.

4. Recital of filing of motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Plaintiff's exceptions to master's report.

11. Memorandum of the court.

12. Interlocutory decree.

13. Final decree.

14. Motion to consolidate cases for appeal, together with order of the court thereon.

15. Motion to sever Joseph Stone, together with order of the court thereon.

16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

17. Necessary appeal papers.

In Case No. 3850 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Plaintiff's exceptions to master's report.

11. Memorandum of the court.

12. Interlocutory decree.

13. Final decree.

14. Motion to consolidate cases for appeal, together with order of the court thereon.

15. Motion to sever Arthur D. Cronin, together with order of the court thereon.

16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

17. Necessary appeal papers.

In Case No. 3851 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank, is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.

5. Order appointing special master.

6. Receiver's notice to admit facts.

7. Plaintiff's answer to receiver's notice to admit facts.

8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.

9. Master's report and exhibits.

10. Exceptions of Boston-Continental National Bank and Frederick S. Deitrick, receiver, to master's report.

11. Plaintiff's exceptions to master's report.

12. Memorandum of the court.

13. Interlocutory decree.

14. Final decree.

15. Motion to consolidate cases for appeal, together with order of the court thereon.

16. Motion to sever Westchester Discount Corporation, together with order of the court thereon.

17. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.

18. Necessary appeal papers.

In Case No. 3852 Equity.

1. The following papers originally filed in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts:

(a) Bill of complaint against Boston-Continental National Bank, defendant.

(b) Plea of defendant Boston-Continental National Bank that John B. Cunningham, receiver of the defendant bank is a necessary party defendant.

(c) Plaintiff's motion to join John B. Cunningham, receiver of the defendant bank, as a party defendant and to amend its bill of complaint, together with order of the court thereon.

(d) Defendant's petition to remove the cause to the United States District Court for the District of Massachusetts.

(e) Removal bond filed February 25, 1933.

(f) All docket entries in the said Superior Court.

2. Answer of Boston-Continental National Bank and John B. Cunningham, receiver.

3. Motion of Frederick S. Deitrick, receiver, to be substituted as party defendant, together with order of the court thereon.

4. Motion of defendant bank and receiver for a master.
5. Order appointing special master.
6. Receiver's notice to admit facts.
7. Plaintiff's answer to receiver's notice to admit facts.
8. Plaintiff's motion to amend bill of complaint, together with order of the court thereon.
9. Master's report and exhibits.
10. Plaintiff's exceptions to master's report.
11. Memorandum of the court.
12. Interlocutory decree.
13. Final decree.
14. Motion to consolidate cases for appeal, together with order of the court thereon.
15. Motion to sever Gordon A. Robinson, together with order of the court thereon.
16. Praecipe of Boston-Continental National Bank and Frederick S. Deitrick, receiver.
17. Necessary appeal papers.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
GOODWIN, PROCTER & HOAR.
Attorneys for Boston-Continental National Bank and Frederick S. Deitrick, Receiver of said Bank.

Service acknowledged this sixth day of November, 1936.

STEWART & CHASE,
Attorneys for Standard Surety & Casualty Company of New York.

A citation on appeal was issued on the fifteenth day of September, A. D. 1936, on behalf of the Boston-Continental National Bank in the four equity cases, numbered 3849, 3850, 3851 and 3852, said citation being made returnable in the United States Circuit Court of Appeals on October 13, 1936. Service of said citation was duly acknowledged.

No. 3850, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff,

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity.

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank and Arthur D. Cronin, Defendants.

BILL OF COMPLAINT.

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said

Boston. The defendant Arthur D. Cronin is a resident of said Boston.

3. The plaintiff is informed and believes and therefore avers that on or about September 6th, A. D. 1930, the defendant Arthur D. Cronin and one Percy G. Cliff executed an instrument, a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "endorsements", copies of which marked respectively C., D. and E. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. D. and E. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. D. and E. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. D. and E. or any of them by suit or otherwise.

2. That the said instruments marked A. C. D. and E. be declared

null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

Standard Surety & Casualty Company of New York.
Home Office 80 Johns Street New York, N. Y.

No. $20,000.00

Know all Men by these Presents, That we, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.), to be paid to said Continental National Bank of Boston, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Arthur D. Cronin shall, within six months from date hereof, make to the Continental National Bank of Boston, full and true payment of note in the amount of twenty thousand dollars ($20,000.), maturing September twenty-second, nineteen hundred and thirty, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the Home office of such Surety at 80 John Street, New York City, New York, within ten days (10), by registered mail, of such default, and the Surety Company shall within thirty days (30) pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of de-

fault six months from date hereof and in no event exceeding twenty thousand dollars, ($20,000).

Witness our hands and seals, and dated this 6th day of September, A. D. 1930.

ARTHUR D. CRONIN [SEAL]

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

By Percy G. Cliff Attorney in fact.

B.

RELEASE.

Whereas, on the sixth day of September nineteen hundred thirty, Arthur D. Cronin of Boston, in the County of Suffolk and the Commonwealth of Massachusetts, as Principal and the Standard Surety and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Arthur D. Cronin, as Principal and the Standard Surety & Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of twenty thousand dollars ($20,000), to be paid to said Continental National Bank of Boston in the event that the said Arthur D. Cronin should not, within six months from the date hereof, fully pay and discharge to the said Continental National Bank, the sum of twenty thousand dollars ($20,000.) advanced to said Arthur D. Cronin on a certain promissory note of twenty thousand dollars ($20,000.) made by said Arthur D. Cronin to said Continental National Bank of Boston, bearing date, August twenty-second, nineteen hundred thirty and maturing due the twenty-second day of September, nineteen hundred thirty.

And whereas said Arthur D. Cronin has fully paid and discharged his obligation under said note, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harm-

less, the said Surety Company from any liability whatsoever under, or in connection with said Bond.

In witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this ninth day of September, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By T. M. Ragan, President.

Signed, sealed and delivered in the presence of
Arthur D. Cronin, witness.

C.

Standard Surety & Casualty Company of New York.
Home Office: 80 John Street, New York.
Boston Branch Office, 33 Broad Street, Percy G. Cliff, Manager.
Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $15,000., or such portion thereof as may remain unpaid on date of May 22nd, 1931.

In event of default on the part of the principal, said Arthur D. Cronin of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twenty-first day of March, A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK.
By Percy G. Cliff Attorney-in-fact.

D.

Standard Surety & Casualty Company of New York.

v.

Home Office: 80 John Street, New York.

Boston Branch Office, 33 Broad Street, Percy G. Cliff, Manager

Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended for a period of two months to May 22nd, 1931, is hereby further extended in an amount not to exceed $15,000., or such portion thereof as may remain unpaid on date of November third, nineteen hundred thirty-one.

In event of default on the part of the principal, said Arthur D. Cronin, of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twenty-first day of May A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

By Percy G. Cliff, Attorney-in-Fact.

E.

ENDORSEMENT.

For Value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $20,000. in connection with a note of Arthur D. Cronin of Boston, given to the said Continental National Bank of Boston and maturing on March 22nd, 1931 and subsequently extended to November 3rd, 1931, is hereby further extended in an

amount not to exceed $14,000.00 or such portion thereof, as may remain unpaid on date of November 3rd, 1932.

In event of default on the part of the principal, said Arthur D. Cronin of Boston, the obligee the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail of such default.

Witness our hand, this second day of November, nineteen hundred thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid.

. . . . . .

And on said nineteenth day of July 1932, the following Plea of Boston-Continental National Bank was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity No. 39425.

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Arthur D. Cronin.

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK.

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Compaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931, by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931, and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of

his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the bill of complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Also on said nineteenth day of July 1932, the plea of said Arthur D. Cronin was filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity. No. 39425.

Standard Surety and Casualty Company of New York

and

Boston-Continental National Bank and Arthur D. Cronin.

PLEA OF ARTHUR D. CRONIN.

Now comes Arthur D. Cronin and expressly reserving his right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hun-

dred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

The defendant Arthur D. Cronin further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint because

First: John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined or named in the Bill of Complaint.

Second: The Court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Arthur D. Cronin moves that the bill be dismissed with costs. By his Attorney,

DANIEL A. SHEA.

And the Court endorsed the following on said Plea, to wit:

July 19, 1932. May be filed. Whiting, J.

Thence the case was continued unto the fifth day of December 1932, when on said day the following rulings on pleas of defendants was handed down, to wit:

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. Superior Court. In Equity.

No. 39422.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424.

Standard Surety & Casualty Company of New York.

v.

Boston-Continental National Bank, et al.

No. 39425.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN.

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the Bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the Bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the Bank. The Bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the Bank. An injunction against the Bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the Bank. The receiver and the Bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and though not obliged to assume their defence, will be bound by a decree against the Bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the

receiver will be bound by any decree against the Bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville,* 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace,* 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank,* 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule; and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably

unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court.

Thereafter, on the ninth day of December 1932, the following motion to join a party defendant and to amend bill of complaint was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39425.

Standard Surety & Casualty Company of New York, Plaintiff,

vs.

Boston Continental National Bank and Arthur D. Cronin, Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its bill of complaint as follows:

1. By adding, in the heading thereto, after the name, "Arthur D. Cronin", and before the word "Defendants" the following:

"John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said bill of complaint the following:

"The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the bill of com-

plaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver".

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver".

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

. . . . . .

And the following was endorsed on said motion to wit:

Suffolk, ss. Dec. 19, 1932.

(F. T. Hammond, Jr.)

Allowed by court & process to issue.

Attest: LEO A. REED Asst. Clerk.

. . . . . .

Thereafter, on the twenty-fifth day of February 1933, the defendants' Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39425.

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Arthur D. Cronin and John D. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Now come your petitioners, Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County;

said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham, receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Arthur D. Cronin and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Arthur D. Cronin filed in this Court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendants filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was

allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $20,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Masachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoena served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver
ARTHUR D. CRONIN
By D. A. Shea Atty.

JOHN B. CUNNINGHAM
As he is Receiver of Boston-
Continental National Bank

Commonwealth of Massachusetts.

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

Murray F. Hall
[SEAL]. Notary Public.

And on the twenty-fifth day of February 1933, the following Bond is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39425.

Standard Surety & Casualty Company of New York
v.
Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents.

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, as he is receiver of Boston-Continental

National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff and Boston-Continental National Bank, Arthur D. Cronin and John B. Cunningham, as he is receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusetts.

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK
By John B. Cunningham Receiver. [SEAL]
JOHN B. CUNNINGHAM
As he is Receiver of Boston-
Continental National Bank.

And the following are endorsed on said Removal Bond, to wit:

This bond may be approved. Stewart & Chase.

Feb. 25, 1933.

Bond accepted by the court. (QUA, *J.*)

Attest: CLESSON S. CURTICE Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

Feb. 25, 1933.

Petition accepted by the court. (QUA, *J.*)

Attest: CLESSON S. CURTICE Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk.*

DOCKET ENTRIES.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss. Superior Court. No. 39425 Eq.

Standard Surety & Casualty Company of New York

vs.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932, April 25
1 Federal Street	Goodwin, Procter & Hoar
	84 State St.

Bill entered Feb. 23, 1932

Subpoena returnable April issued.

Mar. 15, Subpoena returned (1)

April 25, Defendants' petition for removal to District Court of the United States for Massachusetts (2) accepted

April 25, Removal Bond (3)

1932, May 2, Copies prepared for District Court of the United States for the District of Massachusetts

July 5, Remanded to State Court (4)

July 19, Motion of Boston-Continental National Bank leave to file its plea reserving answer (5) allowed.

July 19, Plea of Boston Continental National Bank (6)

July 19, Plea of Cronin (7)

Dec. 5, Rulings on pleas of defendants (Qua J.)

(See paper No. 6 in 39422 Eq.)

Dec. 9, Motion to join party defendant and to amend bill (8)

Dec. 19, Motion (paper No. 8) allowed and process ordered and subpoena returnable January & issued.

1933, Jan. 10, Subpoena returned (9)

Feb. 25, Defendants' petition for removal to United States District Court for District of Massachusetts (10) approved.

Feb. 25, Removal Bond (11)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Arthur D. Cronin, and was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C", "D" and "E"; that if a purported release was delivered to said Cliff by Continental National Bank, by T. M. Ragan, president, in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C", "D" and "E", has been broken in that Arthur D. Cronin, the principal named in said instrument, has not paid the note described therein according to its terms but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said note; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Arthur D. Cronin are in excess of $20,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed and allowed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume, on page 195 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk*.]

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants, the Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on page 196 of this volume in case No. 3849, Equity. JAMES S. ALLEN, *Clerk*.]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit faces are the same as those already printed on pages 27–35 of this volume in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk*.]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed on pages 199–201 in case No. 3849, Equity, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

MCLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

June 18, 1936.

H. D. M.,

D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is.

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor. By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1931.
H. D. M.,
D. J.

MEMORANDUM.

March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume in case No. 5225, Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF ARTHUR D. CRONIN.

[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from Arthur D. Cronin, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

No. 3851, EQUITY DOCKET.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff.

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING:

Know Ye, That among our records of our Superior Court for the

said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. In Equity.

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants.

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Corporation and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed marked B and made a part hereof.

Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or

intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. $40,000.00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the

Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.) to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents. The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

SCHEDULE OF NOTES.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 20, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note, the obligee shall notify the home office of the Surety Company at 80 John Street, New York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION [SEAL]
By Joseph Stone, Treas.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

B.

RELEASE.

Whereas, on the twentieth day of December, nineteen hundred and thirty, the Westchester Discount Corporation of Mount Vernon,

New York, as Principal, and the Standard Surety and Casualty Company of New York, a Corporation organized and existing under the laws of the State of New York and having a usual place of business in Boston, as Surety, did execute a Bond to the Continental National Bank of Boston, wherein the said Westchester Discount Corporation as Principal and the Standard Surety and Casualty Company, as Surety, did bind themselves to the said Continental National Bank of Boston in the sum of forty thousand dollars, ($40,000.), to be paid to said Continental National Bank of Boston in the event that the said Westchester Discount Corporation should not, within four months from the date hereof, fully pay and discharge to the said Continental National Bank of Boston, the sum of forty thousand dollars ($40,000.) made on a series of promisory notes aggregating forty thousand dollars ($40,000.) made by said Westchester Discount Corporation to said Continental National Bank of Boston, bearing date December twentieth, nineteen hundred and thirty each in the amount of ($10,000.) ten thousand dollars, and maturing respectively on dates of January twentieth, nineteen hundred and thirty one, February twentieth, nineteen hundred and thirty-one, March twentieth, nineteen hundred and thirty-one and April twentieth, nineteen hundred and thirty-one.

And whereas said Westchester Discount Corporation has fully paid and discharged its obligations under said notes, now therefore, in consideration of the premises and of one dollar ($1.00) in hand, well and truly paid by said Surety Company to said Continental National Bank of Boston, receipt of which is hereby acknowledged, said Continental National Bank of Boston does hereby forever discharge, release and hold harmless, the said Surety Company from any liability whatsoever under, or in connection with, said bond.

In witness whereof, said Continental National Bank of Boston has caused these presents to be executed by the signature of its president thereunto, duly authorized under seal.

All of which is done at Boston, aforesaid, this twenty-third day of December, nineteen hundred and thirty.

CONTINENTAL NATIONAL BANK OF BOSTON [SEAL]
By Terrell M. Ragan.

Signed, sealed and delivered in the presence of
Witness

C.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office: 33 Broad Street Percy G. Cliff, Manager
Telephone Hancock 8811 Boston, Mass.

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of June 20th, 1931. In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the home office of this Company at 80 John Street, New York City within five days by registered mail, of such default.

Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff Attorney-in-Fact

D.

Standard Surety & Casualty Company of New York
Home Office: 80 John Street, New York
Boston Branch Office, 33 Broad Street, Percy G. Cliff Manager
Telephone Hancock 8811 Boston, Mass

ENDORSEMENT.

For value received, Note Guarantee Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000. in connection with a series

of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20th, 1931 and subsequently extended for a period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000. or such portion thereof as may remain unpaid on date of December 20th, 1931.

In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston, and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

Witness our hand this twentieth day of June A. D. nineteen hundred and thirty-one.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff Attorney-in-Fact.

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq. its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

Subpoena returnable April issued

. . . . . .

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. In Equity No. 39422

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Westchester Discount Corporation

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931 and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the bill of complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the bill of complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Thereafter on the fifth day of December, 1932, the following rulings on pleas of defendant was handed down, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity.

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN.

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the bank. The bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the bank. An injunction against the bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the bank. The receiver and the bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and

though not obliged to assume their defence, will be bound by a decree against the bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville,* 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace,* 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank,* 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania,* 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears

for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court.

On the ninth day of December, 1932, the following motion to join a party defendant and to amend bill of complaint was filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity No. 39422

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston-Continental National Bank, and Westchester Discount Corporation, Defendants

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston-Continental National Bank, as a party defendant, and to amend its bill of complaint as follows:

1. By adding, in the heading thereto, after the name "Westchester Discount Corporation", and before the word "Defendants" the following:

> "John B. Cunningham, as he is receiver of said Boston-Continental National Bank."

2. By adding, after paragraph No. 2 of said bill of complaint the following:

> "The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston-Continental National Bank ap-

pointed by the Comptroller of the Currency of the United States on December 22, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver."

By its Attorneys,
STEWART & CHASE,
JAMES T. CONNOLLY.

Attached to the foregoing motion is the following, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. No. 39422

Standard Surety & Casualty Co. of N. Y., Plff.

vs.

Bos. Con. Nat. Bk. and Westchester Discount Corp., Deft.

I, Raymond Baldwin (attorney for) (in behalf of) the above named plaintiff make oath that on the ninth day of Dec. A. D. 1932, I gave notice in writing to the *the* defendant Bos. Con. Nat. Bk. and Wes. Dis. Corp. in the above entitled action that I should make a motion to Join a Receiver in the Equity Session, First Division of said court, at Boston on Monday the Nineteenth day of Dec. A. D. 1932, at 10 o'clock, in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to attorneys for Bos. Con. Nat. Bk. and Westchester Discount Corp.

GOODWIN, PROCTER, FIELD & HOAR,
84 State Street, Boston

R. BALDWIN.

Boston, Dec. 9, 1932

Subscribed and sworn to before me, E. Hazel Sullivan,
Notary Public

. . . . . .

Thereafter, on the twenty-fifth day of February, 1933, defendant's Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court. In Equity No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Now come your petitioners, Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931 the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said Comptroller appointed the defendant, John B. Cunningham receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Westchester Discount Corporation and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business

prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Westchester Discount Corporation filed in this court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendant Boston-Continental National Bank filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $40,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoenas served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK,
By John B. Cunningham, Receiver

WESTCHESTER DISCOUNT CORPORATION,
By A. G. Gould, Attorney

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL, [SEAL]
Notary Public

And on said twenty-fifth day of February, 1933, the following Bond is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, Receiver of Boston-Continental National Bank

REMOVAL BOND

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York in the penal sum of five hundred dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Westchester Discount Corporation and John B. Cunningham, as he is Receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusetts;

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts within thirty days from the date of the petition filed herewith a certi-

fied copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK, [SEAL]
By John B. Cunningham, Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

And the following are endorsed on said Bond for Removal, to wit:

This bond may be approved Stewart & Chase

Feb. 25, 1933.

Bond accepted by the court. Qua, *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk.

And the following are endorsed on said Petition for Removal, to wit:

This bond [Petition] may be approved [allowed] Stewart & Chase

Feb. 25, 1933.

Bond [Petition] accepted by the court. Qua, *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this

eleventh day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk*

Commonwealth of Massachusetts

Suffolk, ss. Superior Court No. 39422 Eq.

DOCKET ENTRIES

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932 April 25 Goodwin, Procter
1 Federal Street	& Hoar, 84 State St.

Bill entered Feb. 23, 1932, Subpoena returnable April issued.

Apr. 4, Subpoena returned (1)

April 25, Defendants' petition for removal to District Court of the United States District Court of Massachusetts (2) approved

April 25, Removal Bond (3)

May 2, Copies prepared for District Court of the United States for the District of Massachusetts.

July 5, Remanded to state court (See paper No. 4)

July 19, Motion of defendant to file plea reserving its answer (4) allowed

July 19, Plea of Boston Continental National Bank (5)

Dec. 5, Rulings on pleas of defendants (Qua, *J.*) (6)

Dec. 9, Motion to join party defendant and to amend bill (7)

Dec. 19, Motion (paper No. 7) and allowed and process ordered; Subpoena returnable February & issued.

1933 Jan. 10, Subpoena returned (8)

Feb. 25, Defendants' petition for removal to District Court of United States for District of Massachusetts (9) accepted.

Feb. 25, Removal Bond (10)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk.*

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Westchester Discount Corporation by Joseph Stone, its treasurer, and was duly executed by the plaintiff, by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C" and "D"; that if a purported release was delivered to said Cliff by Continental National Bank by Terrell M. Ragan in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C" and "D", has been broken in that Westchester Discount Corporation, the principal named in said instrument, has not paid the notes described therein according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said notes; that the plaintiff was duly notified of the default in accordance with the provisions of the said instrument; that the damages sustained by these defendants on account of the default of said Westchester Discount Corporation are in excess of $40,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court:

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume on page 195 in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, February 2, 1935, a motion for a master was filed by defendants, Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on page 196, 197 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit facts are the same as those already printed on pages 27–35 of this volume, in case No. 5225 Law; they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, June 6, 1935, the following Master's and Auditor's Report together with Exhibits was filed:

MASTER'S AND AUDITOR'S REPORT.

[Filed June 6, 1935.]

EXHIBITS.

[MEMORANDUM. Copy of master's and auditor's report and exhibits are here omitted as they will be found printed on pages 42–129 of this volume in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

On the fourteenth of said June the following Respondent's Exceptions to Master's Report were filed:

RESPONDENT'S EXCEPTIONS TO MASTER'S REPORT.

[Filed June 14, 1935.]

Now comes the Boston-Continental National Bank and Frederick S. Deitrick, receiver, respondents in the above-entitled cause and file the following exceptions to the report of the master filed herein on June 6, 1935 to wit:

1. To the ruling of the master that the Westchester bond dated December 20, 1930, and "endorsements" do not secure payment of the note of forty thousand dollars ($40,000) of Westchester Discount Corporation dated December 23, 1930, and that there can be no recovery on this bond or the "endorsements". (Master's report, pages 40, 41 and 49.)

By their Attorneys,

GOODWIN, PROCTER & HOAR

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed on pages 200, 201 of this volume, in case 3849 Equity, they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on Master's Report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

MCLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.
H. D. M.,
D. J.

Also on the said eighteenth day of June A. D. 1936, the following Final Decree is entered:

FINAL DECREE.
June 18, 1936.

MCLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.

HUGH D. MCLELLAN,
D. J.

MEMORANDUM.
March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.
[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225, Law, except that the "defendant" files the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF WESTCHESTER DISCOUNT CORPORATION.
[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from Westchester Discount Corporation, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,
GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS

September 25, 1936. Allowed.

HUGH D. MCLELLAN,
D. J.

No. 3852, Equity Docket.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, Plaintiff

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL., Defendants.

This cause was begun in the Superior Court for the County of Suffolk, District of Massachusetts, and was thence removed by the defendant to this United States District Court and was filed in this court on the eighteenth day of March, A. D. 1933, and is in the words and figures following:

RECORD OF STATE COURT.

[Filed in District Court March 18, 1933.]

(EXTRACTS.)

Commonwealth of Massachusetts.

SUFFOLK, ss.

To all Persons to whom these Presents shall come, GREETING: Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity

Standard Surety & Casualty Company of New York, Plaintiff,

vs.

Boston-Continental National Bank and Gordon A. Robinson, Defendants.

BILL OF COMPLAINT

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national banking association legally established and existing under the laws of the United States of America, having its usual place of business in said

Boston. The defendant Gordon A. Robinson is a resident of said Boston.

3. The plaintiff is informed and believes and therefore avers that on or about July 8th, A. D. 1931 the defendant Gordon A. Robinson and one Percy G. Cliff executed an instrument, a copy of which is hereto annexed marked A and made a part hereof. Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed another instrument purporting to be an "Endorsement" of said instrument first named extending the terms and provisions thereof to July 8th, 1932, a more particular description of which said "Endorsement" is to the plaintiff unknown.

4. The plaintiff is informed and believes and therefore avers that the instrument a copy of which is hereto annexed marked A and the instrument hereinabove described purporting to be an "Endorsement" were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. The instrument a copy of which is hereto annexed marked A and the "Endorsement" thereof above described were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the instrument a copy of which is hereto annexed marked A by suit or otherwise.

2. That the said instrument and any instrument purporting to be

an "Endorsement" or extension thereof be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

By its attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

A.

No. 12420–31 $20,000.00

Know all Men by these Presents, That we, Gordon A. Robinson of Boston in the County of Suffolk and the Commonwealth of Massachusetts, doing business as Robinson Engineering Company, as principal, and the Standard Surety and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston, as surety, are held and firmly bound and obliged unto the Boston Continental National Bank, a banking corporation duly organized under the laws of the United States of America and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to said Boston Continental National Bank, as hereinafter provided, to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents.

The condition of this obligation is such that if Gordon A. Robinson shall, within four months from date hereof, make to the Boston Continental National Bank, full and true payment of note in the amount of twenty thousand dollars ($20,000), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in the whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect.

In the event of default on the part of the principal, the obligee shall notify the home office of such surety at 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days,

pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at the time of default, four months from date hereof and in no event exceeding twenty thousand dollars ($20,000.00); the liability of the surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two.

Witness our hands and seals and dated this eighth day of July A. D. 1931.

GORDON A. ROBINSON,
D/B as Robinson Engineering Co.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-fact

This bill was entered and filed in our said court on the twenty-third day of February, A. D. 1932, when and where the plaintiff appeared by Messrs. Stewart & Chase and James T. Connolly, Esq., its attorneys as aforesaid. And the following was endorsed on said bill, to wit:

"Subp. ret. April issued."

And on said nineteenth day of July, 1932, the following Plea of Boston Continental National Bank was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39423

Standard Surety and Casualty Company of New York

v.

Boston-Continental National Bank and Gordon A. Robinson

PLEA OF BOSTON-CONTINENTAL NATIONAL BANK

Now comes Boston-Continental National Bank and expressly reserving its right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank, closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B.

Cunningham receiver of said defendant bank on December 22, 1931 and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

And said defendant bank further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint, because

First. John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined nor named in the Bill of Complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant, Boston-Continental National Bank moves that the bill be dismissed with costs.

By its Attorneys,

GOODWIN, PROCTER & HOAR.

Also on said nineteenth day of July, 1932, the following plea of Gordon A. Robinson was filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. In Equity No. 39423

Standard Surety and Casualty Company of New York

vs.

Boston-Continental National Bank and Gordon A. Robinson

PLEA OF GORDON A. ROBINSON

Now comes Gordon A. Robinson and expressly reserving his right to file answer herein hereby pleads to the plaintiff's Bill of Complaint as follows:

The defendant, Boston-Continental National Bank closed in the regular course of business on December 16, 1931, and did not open thereafter. The affairs of said defendant bank were taken over on December 17, 1931 by the Comptroller of the Currency of the United States and said Comptroller of the Currency appointed John B. Cun-

ningham receiver of said defendant bank on December 22, 1931, and said receiver duly qualified by filing bond in the amount of four hundred thousand dollars ($400,000) for the faithful performance of his duties; said John B. Cunningham is still acting as such receiver and has complete control over the assets and affairs of said defendant bank.

The defendant Gordon A. Robinson further pleads and says that this Honorable Court has no jurisdiction to grant the relief prayed for by the Bill of Complaint because

First: John B. Cunningham, receiver of said Boston-Continental National Bank, is a necessary party in this suit but is not joined or named in the Bill of Complaint.

Second. The court has no jurisdiction to enter any decree in this suit against the defendant bank while it is in the hands of a receiver appointed by the Comptroller of the Currency.

Wherefore, the defendant Gordon A. Robinson moves that the bill be dismissed with costs.

By his attorney,
DANIEL A. SHEA.

And the court endorsed the following on said Plea, to wit:

"July 19, 1932 May be filed. Whiting *J.*"

Thence the suit was continued unto the fifth day of December, 1932 when on said day, the following rulings on plea of defendants was handed down, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity

No. 39422

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39424

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

No. 39425

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, et al.

RULINGS OF THE COURT ON PLEAS OF THE DEFENDANTS BOSTON-CONTINENTAL NATIONAL BANK, GORDON A. ROBINSON AND ARTHUR D. CRONIN

These suits came on to be heard together by me on the pleas of the defendants Boston-Continental National Bank, Gordon A. Robinson and Arthur D. Cronin. It was agreed that the facts set up in the pleas are true and that I should pass upon the merits of the pleas as well as upon their sufficiency in law.

The pleas first raise the point that the receiver of the bank appointed by the Comptroller of the Currency is a necessary party. The receiver had been appointed before these suits were brought. All the assets of the bank are in the complete control of the receiver. This necessarily includes the bonds which these suits seek to have canceled. If these papers are to be delivered up for cancellation as prayed for, they must be delivered up by the receiver and not by the bank. The bank is powerless in the matter. Looking at the cases apart from the literal conception of the delivery up of papers to be canceled and treating the bills simply as attempts to have the bonds declared void by judicial fiat, the fact remains that these bonds, if valid, are assets of the receiver and not of the bank. An injunction against the bank would be futile unless it also bound the receiver. The suits seek to have declared void apparently valid assets in the hands of the receiver for which the receiver is accountable to the United States, whose officer he is. He is not an agent of the bank. The receiver and the bank are not to be treated by the law as if they were one and the same. See *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. Unless therefore it can somehow be claimed that the receiver, though not a party to these suits and

though not obliged to assume their defence, will be bound by a decree against the bank, it is clear that the suits will prove fruitless and the trial of them will be a waste of time. The plaintiff has claimed that the receiver will be bound by any decree against the bank; but he cites in support of this proposition cases like *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall 383, where a proof of claim for a debt established in an action at law against the bank was held to bind the receiver to include this liability with other proved claims in making distribution. Cases so holding rest upon express provisions of the National Bank Act bringing about that result. They are quite unlike the cases at bar where the attempt is not to prove a claim as the basis of sharing a dividend, but to take from the receiver and destroy an apparent asset in his sole possession and control. This distinction is pointed out in *Barons* v. *First National Bank of Plainville*, 28 Fed. (2d) 615. If any of the cases cited by the plaintiff ignore the difference between the two classes of cases, it seems to me that they misapprehend the basis and limitations of the rule in the Bank of Bethel case. The Supreme Court of the United States itself has said (in a case where the plaintiff sought to set aside his stock subscription agreement for fraud) that as the rights of the receiver were involved, the only way in which the plaintiff could effectively raise the question was by a suit against the bank and the receiver. *Lantry* v. *Wallace*, 182 U. S. 536, 549. *Ryan* v. *Mt. Vernon National Bank*, 206 Fed. Rep. 452. If the receiver can be bound, though not a party, it must be because of some special rule applicable to this particular situation. There seems to be no need of any such special rule, and I am not convinced that it exists. I do not find anything to the contrary in *Earle* v. *Pennsylvania*, 178 U. S. 449. That case shows how a plaintiff can preserve a lien which he acquired under state law before the comptroller took possession of the bank. It is not like these cases. Most of the cases which I have seen concede the right of the plaintiffs to sue a receiver of this kind in the state court in the first instance, subject of course to any right of removal which the receiver may have. The receiver is, then, a party whose presence is necessary to any really effective prosecution of the suit, it is possible to make him a party, and no reason appears

for not having done so. He is a necessary party under ordinary principles of equity practice.

The second point taken in the pleas, as to jurisdiction, is probably unsound, but does not render the pleas bad. It is offered only as a deduction from the single set of facts pleaded, which in themselves state a defence to the suits.

It is therefore ordered that an interlocutory decree be entered in each case adjudging the pleas sufficient and allowing and sustaining the same.

STANLEY E. QUA,
Justice of the Superior Court

Subsequently on the ninth day of December, 1932, plaintiff's motion to join a party defendant and to amend Bill of Complaint was filed, as follows, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. In Equity. No. 39423

Standard Surety & Casualty Company of New York, Plaintiff

vs.

Boston Continental National Bank, and Gordon A. Robinson, Defendants.

MOTION TO JOIN A PARTY DEFENDANT AND TO AMEND BILL OF COMPLAINT.

Now comes the plaintiff and moves to join John B. Cunningham, receiver of the defendant Boston Continental National Bank, as a party defendant, and to amend its Bill of Complaint as follows:

1. By adding, in the heading thereto, after the name "Gordon A. Robinson", and before the word "Defendants" the following:

> "John B. Cunningham, as he is Receiver of said Boston Continental National Bank."

2. By adding, after paragraph No. 2 of said Bill of Complaint the following:

> "The defendant John B. Cunningham is the duly qualified receiver of this defendant Boston Continental National Bank appointed by the Comptroller of the Currency of the United States on December 23, 1931."

3. By adding to the end of paragraph No. 5 of the Bill of Complaint after the words "in the possession of the defendant bank" the words "or of the defendant John B. Cunningham as such receiver."

4. By adding in paragraph No. 2 of the prayer, after the words "the defendant bank" and before the words "be ordered to deliver them up to be cancelled", the words "and the defendant receiver."

By its Attorneys,

STEWART & CHASE,
JAMES T. CONNOLLY.

Attached to said motion is the following, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. No. 39423

Standard Surety & Casualty Co. of N. Y. Plff. *vs.* Bos. Con. Nat. Bk. and Gordon A. Robinson Deft.

AFFIDAVIT OF NOTICE OF MOTION.

I, Raymond Baldwin (Attorney for) (in behalf of) the above named plaintiff make oath that on the ninth day of Dec. A. D. 1932, I gave notice in writing to the *the* defendant Bos. Con. Nat. Bk. and J. Stone in the above entitled action that I should make a motion to Join a Receiver in the Equity Session, First Division of said court, at Boston on Monday the Nineteenth day of Dec. A. D. 1932, at 10 o'clock in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to Attorneys for Bos. Con. Nat. Bk. and Attorney for Gordon A. Robinson.

Goodwin, Procter, Field & Hoar
84 State Street, Boston

Daniel A. Shea,
1 State Street, Boston

R. BALDWIN

Boston, December 9, 1932

Subscribed and sworn to before me,

E. Hazel Sullivan
Notary Public

And the following were endorsed on said motion, to wit:

"Subp. ret. Feb. issd."

"(F. T. Hammond *J.*)

Suffolk, ss., Boston Dec. 19, 1932

Allowed by the Court & process to issue.

Attest: Leo A. Reed, Asst. Clerk."

Thereafter, on the twenty-fifth day of February, 1933, defendants' Petition for Removal of this action to the District Court of the United States for the District of Massachusetts is filed, to wit:

Commonwealth of Massachusetts

Suffolk, ss. Superior Court In Equity No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, Receiver of Boston-Continental National Bank.

DEFENDANTS' PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Now come your petitioners, Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, receiver of Boston-Continental National Bank, appearing specially without submitting to the jurisdiction of the court but expressly contesting said jurisdiction, and respectfully represent as follows:

1. The defendant Boston-Continental National Bank is a national banking association duly organized and existing under the laws of the United States with a place of business at Boston in said County; said bank closed in the regular course of business on December 16, 1931 and did not open thereafter; on December 17, 1931, the Comptroller of the Currency of the United States in accordance with law took charge of the assets of said bank for the purpose of winding up its affairs; on December 22, 1931, said comptroller appointed the defendant, John B. Cunningham, receiver of said bank and he duly qualified by executing bond for the faithful performance of his duties as such receiver in the amount of $400,000; thereafter, to wit, on the 23rd day of February, 1932 a bill in equity was filed in

the Superior Court for Suffolk County by Standard Surety & Casualty Company of New York against said Boston-Continental National Bank and Gordon A. Robinson and while the affairs of said bank were in the hands of said receiver; that said receiver was not joined as party defendant and the bill of complaint did not disclose the fact that said bank had ceased to do business prior to the filing of the bill and that its affairs were in the hands of a receiver for the purpose of liquidation.

2. Thereafter the defendants Boston-Continental National Bank and Gordon A. Robinson filed in this court petition and bond for removal of the cause to the United States District Court for the District of Massachusetts and the case was duly entered in said United States District Court. Thereafter the plaintiff filed a motion to remand the case to this court on the ground that the receiver of Boston-Continental National Bank was not joined as party defendant; said motion to remand was granted after hearing and the case was remanded to this court.

3. Thereafter the defendants filed by leave of court a special plea to the bill on the ground that the receiver of Boston-Continental National Bank was a necessary party defendant and that the court had no jurisdiction to enter a decree as prayed for against said bank. After hearing on said motion, this court entered an order that an interlocutory decree be entered adjudging the plea sufficient and allowing and sustaining the same.

4. Thereafter the plaintiff filed a motion to join John B. Cunningham, as he is receiver of Boston-Continental National Bank, as party defendant and to amend its bill of complaint. Said motion was allowed by this court and process issued against John B. Cunningham, receiver of Boston-Continental National Bank, returnable to this court on the first Monday of February, 1933.

5. This cause is a suit in equity to cancel a certain indemnity bond in the principal amount of $20,000 now held by John B. Cunningham as receiver as an asset of said Boston-Continental National Bank; it is a suit arising under the Constitution and laws of the United States and is a case for the winding up the affairs of said Boston-Continental National Bank; the District Court of the United States for the

District of Massachusetts has original jurisdiction of this case under Section 24 of the Judicial Code of the United States.

6. Your petitioners desire to remove this suit before trial thereof into the District Court of the United States to be holden in the District of Massachusetts.

7. And your petitioners offer and file herewith good and sufficient bond for their entry in the District Court of the United States for the District of Massachusetts within thirty days from the date of the filing of this petition of a certified copy of the record in this suit and for the payment of all costs that may be awarded by said District Court of the United States if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

8. And your petitioners further represent that written notice of this petition and the bond for removal hereinbefore referred to has been given to the adverse party prior to the filing of the same by sending said notice to Stewart & Chase, 1 Federal Street, Boston, Massachusetts, whose names appear as attorneys for the adverse party on the subpoenas served in this case.

9. And your petitioners therefore pray that said bond may be accepted and that said suit may be removed to the next District Court of the United States to be held in the District of Massachusetts pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had in this court.

BOSTON-CONTINENTAL NATIONAL BANK,
By John B. Cunningham, Receiver

GORDON A. ROBINSON,
by D. A. Shea, Atty.

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank.

Commonwealth of Massachusetts.

Suffolk, ss. February 21, 1933.

Then personally appeared John B. Cunningham and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

MURRAY F. HALL [SEAL]
Notary Public.

And on said twenty-fifth day of February, 1933, the following Bond on Removal is filed, to wit:

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court In Equity No. 39423

Standard Surety & Casualty Company of New York

v.

Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, Receiver of Boston-Continental National Bank.

REMOVAL BOND.

Know all Men by these Presents

That Boston-Continental National Bank, a national banking association duly organized by law with an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, and John B. Cunningham, as he is Receiver of said Boston-Continental National Bank, are jointly and severally held and firmly bound unto Standard Surety & Casualty Company of New York, a corporation duly organized by law and having its principal place of business in the City and State of New York, in the penal sum of Five Hundred Dollars ($500), to the payment whereof well and truly to be made unto the said Standard Surety & Casualty Company of New York, its successors and assigns, they jointly and severally bind themselves and their respective successors and assigns.

The condition of this bond is that

Whereas Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, as he is receiver of Boston-Continental National Bank, have petitioned the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts for the removal of a certain suit in equity pending in said County wherein Standard Surety & Casualty Company of New York is plaintiff, and Boston-Continental National Bank, Gordon A. Robinson and John B. Cunningham, as he is receiver of Boston-Continental National Bank, are defendants to the District Court of the United States for the District of Massachusets;

Now if said defendants, or any one of them, shall enter in said District Court of the United States for the District of Massachusetts

within thirty days from the date of the petition filed herewith a certified copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States for the District of Massachusetts if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be in full force and effect.

In witness whereof said Boston-Continental National Bank has caused these presents to be signed and its corporate seal to be hereunto affixed by John B. Cunningham, its receiver thereunto duly authorized, and John B. Cunningham, as he is receiver of Boston-Continental National Bank, has hereunto placed his hand and seal all on this 21st day of February, 1933.

BOSTON-CONTINENTAL NATIONAL BANK, [SEAL]
By John B. Cunningham, Receiver

JOHN B. CUNNINGHAM,
As he is Receiver of Boston-Continental National Bank

And the following are endorsed on said Bond for Removal, to wit:

"This bond may be approved Stewart & Chase"

"Feb. 25, 1933.

Bond accepted by the court. Qua *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk."

And the following are endorsed on said Petition for Removal, to wit:

"This petition may be allowed Stewart & Chase"

"Feb. 25, 1933.

Petition accepted by the court. Qua *J.*

Attest: CLESSON S. CURTICE, Asst. Clerk."

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, WALTER PERLEY HALL, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this elev-

enth day of March, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL] FRANCIS A. CAMPBELL, *Clerk.*

Commonwealth of Massachusetts.

Suffolk, ss. Superior Court. No. 39423.

DOCKET ENTRIES.

Standard Surety & Casualty Company of New York

vs.

Boston Continental National Bank and Another

Counsel for Complainant	Counsel for Respondent
Stewart & Chase	1932, April 25
1 Federal Street	Goodwin, Procter & Hoar
	84 State St.

Bill entered Feb. 23, 1932, Subpoena returnable April issued.

Mar. 24, Subpoena returned (1)

Apr. 25, Defendants' petition for removal to District Court of United States for Massachusetts (2) accepted

Apr. 25, Removal Bond (3)

1932, May 2, Copies prepared for District Court of the United States for the District of Massachusetts

July 5, Remanded to State Court (4)

July 19, Motion of Boston-Continental National Bank leave to file plea (5) allowed

July 19, Plea of Boston Continental National Bank (6)

July 19, Plea of Robinson (7)

Dec. 5, Rulings on pleas of defendants (Qua J.) (See paper No. 6 in Eq. No. 39422)

Dec. 9, Motion to join party defendant and to amend bill (8)

Dec. 19, Motion (paper No. 8) allowed and process ordered and Subpoena returnable February and issued

1933, Jan. 10, Subpoena returned (9)

Feb. 25, Defendants' petition for removal to District Court of the United States for District of Massachusetts (10) accepted

Feb. 25, Removal Bond (11)

Mar. 11, Copies prepared for District Court of the United States for the District of Massachusetts.

(March 11, A. D. 1933)

Copy.

Attest: FRANCIS A. CAMPBELL, *Clerk*.

[MEMORANDUM. Certain parts omitted from the State Court Record pursuant to directions contained in the praecipe of the Boston-Continental National Bank and the Receiver. JAMES S. ALLEN, *Clerk*.]

This cause was thence continued to the March Term of this court, A. D. 1933, when, to wit, April 14, 1933, the following Answer of Boston-Continental National Bank et al. was filed:

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

[Filed April 14, 1933.]

Now come Boston-Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint say as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint they say that the instrument, copy whereof is attached to the bill of complaint marked "A", was duly executed by Gordon A. Robinson, D/B as Robinson Engineering Company and was duly executed by the plaintiff by Percy G. Cliff, its attorney-in-fact; that they are ignorant as to whether said Cliff executed another instrument purporting to be an endorsement. Except as aforesaid, they deny the allegations contained in the third paragraph of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A", has been broken in that Gordon A. Robinson has not paid the note described therein according to its terms, except the sum of $1,003.15, but on the contrary has failed, refused and declined to pay said note and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, to payment in full of said note; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Gordon A. Robinson are in excess of $20,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
MURRAY F. HALL.

This cause was thence continued from term to term to the December Term, A. D. 1934, when, to wit, January 31, 1935, the following Motion of Receiver to be Substituted as Party Defendant was filed and allowed by the court.

MOTION OF FREDERICK S. DEITRICK, RECEIVER, TO BE SUBSTITUTED AS PARTY DEFENDANT.

[Filed and allowed January 31, 1935.]

[MEMORANDUM. Copy of motion to be substituted as party defendant is here omitted as it is identical with the motion already printed in this volume, on page 195 of this volume in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

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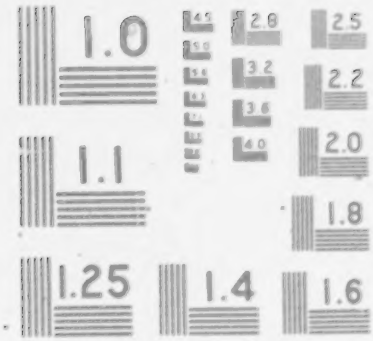

At the same term, to wit, February 2, 1935, a motion for a master was filed by the defendants, Boston-Continental National Bank and Frederick S. Deitrick, receiver.

On the fourth day of said February, the following Order Appointing Special Master was entered:

ORDER APPOINTING SPECIAL MASTER.

February 4, 1935.

[MEMORANDUM. Copy of order appointing special master is here omitted, as it already appears printed on pages 196, 197 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the notice of receiver to admit facts and answer of Standard Surety & Casualty Company to receiver's notice to admit facts are the same as those already printed on pages 27–35 in case No. 5225 Law, they are here omitted. JAMES S. ALLEN, *Clerk.*]

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 10, 1935, the following Motion to Amend Bill of Complaint was filed and allowed:

MOTION TO AMEND BILL OF COMPLAINT.

[Filed and allowed April 10, 1935.]

[MEMORANDUM. Copy of motion to amend bill of complaint is here omitted, as it is identical with the motion to amend, already printed on page 198 of this volume, in case No. 3849, Equity. JAMES S. ALLEN, *Clerk.*]

[MEMORANDUM. Inasmuch as the pleadings and recitals are the same, down to the interlocutory decree, as those printed in case No. 3849, Equity, on pages 199–201 of this volume they are here omitted. JAMES S. ALLEN, *Clerk.*]

On the eighteenth day of June, A. D. 1936, the following Interlocutory Decree on master's report and exceptions thereto is entered:

INTERLOCUTORY DECREE.

June 18, 1936.

McLELLAN, J. This cause came on to be further heard at this term upon the master's report, the exceptions thereto, and the entry of a decree, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the exceptions of the plaintiff to the conclusions of the master contained in his report that the bond and any instruments purporting to be endorsements or extensions thereof are enforceable by the receiver be and the same hereby are sustained, and that all other exceptions of both parties to said report be and the same hereby are overruled; and it is further

Ordered, adjudged and decreed that except as aforesaid said report be and the same hereby is confirmed.

By the Court,

JOHN E. GILMAN, JR.,

Deputy Clerk.

June 18, 1936.

H. D. M.,

D. J.

Also on the said eighteenth day of June, A. D. 1936, the following Final Decree is entered:

FINAL DECREE.

June 18, 1936.

McLELLAN, J. The above-entitled cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that said bond and any instruments purporting to be endorsements or extensions thereof are void and unenforceable as against the plaintiff, and that the defendant bank and the defendant receiver be, and they hereby are, perpetually enjoined from enforcing or attempting to enforce the same against the plaintiff by suit or otherwise; it is further

Ordered, adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed; and it is further

Ordered, adjudged and decreed that the defendant receiver pay to the plaintiff its costs, in a sum to be taxed by the clerk, and that execution issue therefor.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 18, 1936.

H. D. M.,
D. J.

MEMORANDUM.

March 18, 1936.

[MEMORANDUM. Copy of memorandum is here omitted, as it already appears printed on pages 139–141 of this volume, in case No. 5225, Law. JAMES ALLEN, *Clerk.*]

DEFENDANT'S MOTION TO CONSOLIDATE CASES FOR THE PURPOSES OF APPEAL.

[Filed and allowed June 18, 1936.]

[MEMORANDUM. Copy of motion is here omitted as it is identical with the one already printed on pages 146, 147 of this volume, in case No. 5225, Law, except that the "defendants" file the motion in this case and not the "plaintiff". JAMES S. ALLEN, *Clerk.*]

MOTION FOR SEVERANCE OF GORDON A. ROBINSON.

[Filed and allowed September 25, 1936.]

Now come Boston-Continental National Bank and Frederick S. Deitrick, receiver of Boston-Continental National Bank, aggrieved parties in the foregoing proceedings, who have claimed appeals to the United States Circuit Court of Appeals, and move a severance from

Gordon A. Robinson, a possible party in interest in these proceedings who has not claimed an appeal.

By their Attorneys,

GOODWIN, PROCTER & HOAR,
ROBERT E. GOODWIN,
RICHARD M. NICHOLS.

September 25, 1936. Allowed.

HUGH D. MCLELLAN, *D. J.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the records on the appeals of the receiver of Boston-Continental National Bank, Frederick S. Deitrick, from the judgments and final decrees, and of the Boston-Continental National Bank from the final decrees, in the causes, in said District Court determined, entitled

No. 5225, LAW DOCKET,

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE,

No. 5316, LAW DOCKET,

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK (SUBSTITUTED FOR JOHN B. CUNNINGHAM, RECEIVER),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK ET TRUSTEE,

No. 5317, Law Docket,

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank (Substituted for John B. Cunningham, Receiver),

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK et Trustee,

No. 3849, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3850, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3851, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

No. 3852, Equity Docket,

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK

v.

BOSTON-CONTINENTAL NATIONAL BANK ET AL.,

(the seven cases being consolidated for appeal); said transcript includes true copies of the proofs, entries and papers on file which were designated in the praecipe filed in the equity cases, and which were agreed upon in the law cases.

I further certify that transmitted herewith are the originals of the receiver's petition for appeal, the bank's petition for appeal, the citation on appeal of Frederick S. Deitrick, as Receiver, and the citation on appeal of the Boston-Continental National Bank, with the acknowledgments of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the

seal of said District Court, at Boston, in said District, this twelfth day of March, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, March 12, 1937, are here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

On April 27, 1937, this consolidated cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on June 1, 1937, the following Opinion of the Court was filed:

OPINION OF THE COURT.

June 1, 1937.

WILSON, J. In this appeal there were involved four suits at law brought by the receiver of the Continental National Bank of Boston, afterward consolidated with the Boston National Bank and known as the Boston-Continental National Bank, against the defendant-appellee to recover on certain surety bonds issued by an agent of the defendant purporting to secure the payment of certain promissory notes discounted at the Bank, and four suits in equity brought by the Surety Company to cancel said surety bonds, on the ground that they were fraudulently issued by the agent of the appellee without authority or knowledge. By stipulation of the parties the actions at law and the suits in equity are all joined for the purpose of appeal.

The actions at law were originally brought by John B. Cunningham in 1932, receiver. His respective successors as receiver were later joined as plaintiff, Deitrick being the last in order of succession, who was appointed in October, 1934. The use of the word "Bank" herein refers to the Continental National Bank up to December 27, 1930, and to the Boston-Continental National Bank as to all events taking place after that date, although there is no contention that the

Boston-Continental National Bank does not stand in the same relation to the Surety Company as the Continental National Bank.

The equity suits were referred to a master, to whom, as auditor, the law actions were also referred, and whose findings of fact were by agreement of the parties to be considered final. The facts as found by the master and auditor are substantially as follows:

In August, 1930, one Terrell M. Ragan, who was president of the Continental National Bank, and, after the consolidation, of the Boston-Continental National Bank, was indebted to one Cronin in an amount in excess of $20,000. Cronin was owing a third party $19,000 and was being pressed for payment. Cronin had given his check on the Continental National Bank to the third party in discharge of his indebtedness, although at the time he had no substantial balance at the Continental National Bank in his checking account. He sent to Ragan his note for $20,000 and informed Ragan that his check for $19,000 would be presented for payment, and, if not paid, it would mean trouble for them both.

Ragan gave Cronin's note to the discount clerk at the Bank and told him to discount the note and credit the proceeds to Cronin's checking account, which was done, and on presentation of Cronin's check for $19,000, it was paid. Cronin's note was unsecured and Ragan knew it was not a sound investment for the Bank.

Soon after September 1st, 1930, Cronin and Ragan went to Cliff, who was attorney in fact for the Surety Company, and requested him to write a surety bond in the name of the Surety Company to secure the Cronin note to the Bank. Ragan explained to Cliff that the bond would be only "window dressing" to show the bank examiners if they should ask to see the collateral for the Cronin note; that Cliff need not notify his company of the writing of such a bond, which would be valueless, as it would impose no liability on his company; and said further that Ragan as president of the Bank would give Cliff a release running to the Surety Company relieving it of all liability on the bond, which was later done.

They drew a bond on forms furnished to Cliff by the Surety Company, which Cronin as principal and Cliff for the Surety Company signed, running to the Bank, and purporting to secure the Cronin

note of $20,000, which obligation was renewed from time to time by endorsement by Cliff.

In December, 1930, Ragan requested Cliff to issue another and similar bond to secure a note of the Westchester Discount Corporation for $40,000, which Ragan assured Cliff was to enable Ragan to take up on his own account some stock in the proposed consolidation of the Boston National and the Continental National Bank; that the bank examiners might not be satisfied with the Westchester loan unless further secured, and that if the merger did not go through, Cronin, Ragan and Cliff might find themselves subject to criticism and would probably be ruined. Ragan assured Cliff that the bond would be used the same as the Cronin bond and only in case the examiners asked for collateral; that there would be no liability for the Surety Company and a similar release would be given as in the case of the Cronin bond. Cliff gave the bond as requested, and a release executed by Ragan for the Bank was given to Cliff dated December 23, 1930. (On the ground of a misdescription of the notes which this bond purported to secure, the auditor and master ruled that the receiver could not recover on this bond.)

On June 2, 1931, one Joseph Stone owed the bank on notes approximately $52,000. Ragan informed Cliff that the examiners were at the Bank and that he had informed them that these notes were covered by a surety bond, and if he, Cliff, would give the Bank another surety bond for $52,000, Ragan would be able to return all three bonds in a few days. Cliff again complied with this request, though why he did so in the first instance does not appear from the record.

On July 7 and 8, 1931, another surety bond covering a loan of one Gordon A. Robinson was issued by Cliff, a release to be given as in the other cases. Cliff was given to understand that this bond was also to be used to satisfy the bank examiners in case they called for collateral and no liability would result to his company.

To each of these bonds, except the Robinson bond, was attached a copy of the power of attorney issued by the Surety Company authorizing the signing of all bonds by Cliff. However, a letter of instruction, which was not attached to the bonds, limited the authority of

Cliff to issue bonds under such circu ances, which information was imparted to Ragan by Cliff.

All these transactions were carried out at the Bank by the assistant cashier and discount clerk under Ragan's direction. The bonds were handed to the clerk by Ragan and placed in the collateral files by the clerk. Neither the clerk nor any other official or employee of the Bank except Ragan had anything to do with obtaining the bonds or the endorsements approving the renewals of the notes. All the notes and bonds were discussed at directors' meetings, but were obtained by Ragan without prior consultation with any of his directors, and without prior action by the Board. While they were reported to the Board shortly after they were made, the circumstances under which they were issued were not disclosed to the Board.

An examination of the Bank's affairs in February and March, 1931, disclosed a capital impairment of $43,000, due to depreciation of investments and the Comptroller insisted that $300,000 of new capital be put into the Bank upon certain conditions, see *J. Dudley Clark* v. *Boston-Continental National Bank,* 9 Fed. Supp. 81. Clark put this amount in the Bank on June 29, 1931, after investigation of its affairs by himself and son, and upon the statement of Ragan that the loans of Cronin, the Westchester Discount Corporation, Stone and Robinson were secured by surety bonds. The master found that Clark, in part, at least, relied upon these bonds in making his investment, though he never saw the bonds. The Bank remained open until December, 1931, and after June 29, 1931, deposits were made by other depositors to the amount of $300,000, the depositors relying, as the master and auditor found, principally on the fact that the Bank was open for the transaction of business, due indirectly to these bonds, though there is no evidence that the depositors other than Clark knew of the bonds being given.

The power to borrow money is one of the usual attributes of the banking business. *Auten* v. *United States Bank of New York,* 174 U. S. 125, 141, 143. So, too, the obtaining and taking of collateral for a loan must be within the legitimate scope of that business; and a president of a bank and its general manager, therefore, has authority to negotiate a loan and to take collateral therefore without being pre-

viously authorized by the board of directors. It being within the scope of his authority, any notice to him of its illegality is notice to the bank. *Aldrich* v. *Chemical Natl. Bank,* 176 U. S. 618, 627. The master and auditor so ruled.

No question is raised as to the authority of the Surety Company to issue similar bonds under proper circumstances, and the power of attorney of Cliff was broad enough to authorize him to write bonds of this type, though his letter of instructions limited his authority in this respect. There is no evidence that Cliff personally benefited in any way by issuing the bonds, or that any premiums were paid to him.

The master and auditor ruled as a matter of law that the bonds were not binding obligations in the hands of the Bank as a going concern for the reason that the knowledge of Ragan as to their infirmities was imputed to the Bank, and that they were not binding obligations in the hands of the receiver, if his rights were derived through the Bank as distinguished from the creditors.

Here is the principal issue in the case. The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration, a copy of which is typical of the declarations in each law action, with the necessary changes as to the principal and the amount, and is as follows:

> "Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States; that he duly qualified and is now acting as such receiver.
>
> And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Boston-Continental National Bank, a national banking association duly organized by law, with an usual place of business in Boston, a written instrument or bond, copy whereof is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay Boston-Continental Na-

tional Bank the sum of . . . in the event that . . . of . . . in said District, failed within one year from the date of the bond, to wit, June 2, 1931, to make full and true payment to the Boston-Continental National Bank of an obligation in the sum of . . . ; that the condition of said bond as aforesaid has been broken, in that . . . the principal named therein, has not paid the obligation described in said bond, according to its terms, except the sum of . . . ; but on the contrary has failed, refused and declined to pay said obligation and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said obligation; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the defendant on account of the default of said . . . are in excess of . . .

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond, with interest from . . . 1931.

And the plaintiff says that this is an action at law arising under the Constitution and the laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States."

A receiver of a national bank under the banking laws is not the agent of the creditors. He represents them only in that what he does may be for their benefit. An agent is appointed by his principal and is responsible to him. The creditors of a national bank do not appoint the receiver. He is responsible only to the Comptroller. If creditors have certain rights personal to them, the receiver cannot enforce such rights. *Michelsen et al.* v. *Penney,* 10 Fed. Supp. 537, 539, 540.

It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of

the claim. While there are decisions by state courts to the contrary, the federal decisions support this position. *Scott* v. *Armstrong,* 146 U. S. 499, 507; *Cutler* v. *Fry,* 240 Fed. 238; *Yates Center National Bank* v. *Schaede,* 240 Fed. 240; *Yates Center National Bank* v. *Lauber,* 240 Fed. 237; *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 653; *Skud* v. *Tillinghast,* 195 Fed. 1, 5; *Peterson* v. *Tillinghast,* 192 Fed. 287, 289; *Keyes* v. *First National Bank,* 20 Fed. (2d) 678, 686; *Burrowes* v. *Nimocks,* 35 Fed. (2d) 152, 159; *Schumacher* v. *Eastern Bank & Trust Company,* 52 Fed. 925, 928–9; *Rankin, Receiver* v. *City National Bank,* 208 U. S. 541, in which case it was held that where the president of the insolvent bank had manipulated the accounts of the bank by giving a note for which no consideration passed, the only purpose of the transaction "in fact and contemplation was a swindle upon the bank examiner." The court said that "The whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner", and that if the insolvent bank "had sued while it was a going concern it could not have recovered and the receiver stands no better than the bank." The facts of this case are more fully stated in *Cherry* v. *City National Bank,* 144 Fed. 587, 591.

If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found that the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety. *Hookway* v. *First National Bank,* 36 Fed. (2d) 166, 170; *McMullen* v. *Hoffman,* 174 U. S. 639. There is no allegation in the declarations at law that the receiver based his grounds of action on any alleged deception of, or injury to, any ceditors of the Bank, or any alleged deception of, or injury to, any creditors of the Bank, or the surety bonds, nor does the receiver allege that he is suing on account of any creditors so injured.

The grounds of the actions at law are that the bonds alleged to have been issued by Cliff to secure the notes of the several parties referred to in the declarations were between the Surety Company and

the Bank, and were valid, binding obligations. There is no allegation in the declarations that the receiver derived his right of action other than from the contract of suretyship entered into between the Surety Company and the Bank. The receiver cannot rely on these bonds as a basis for recovery without being bound by Ragan's knowledge of their invalidity, which the master found was imputed to the bank. *Keyes* v. *First National Bank, supra,* p. 686; *Curtis, Collins & Holbrook Co.* v. *United States,* 262 U. S. 215, 222, 223; *Munroe* v. *Harriman et al.,* 85 Fed. (2d) 493, 495.

As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditior or creditors, is not raised by the pleadings.

We think the auditor and master in his report went outside the issues raised by the pleadings, since the actions at law are clearly based on the contract between the Surety Company and the Bank, in which case the receiver stands no better than the Bank would have if an action had been brought in the name of the Bank while it was a going concern.

The questions of whether the receiver, having brought an action against the Fidelity & Deposit Company to recover on a bond issued to indemnify the Bank against the unlawful acts of Ragan in taking these bonds, the Surety Company can defend on the ground of an election of remedies, see *Minneapolis National Bank* v. *Liberty National Bank,* 72 Fed. (2d) 434, 436, or for lack of notice of default in the payment of the notes, we do not decide, since there can be no recovery by the receiver on the pleadings in the case.

The judgments of the District Court in the law actions are affirmed.

The decrees in the equity suits and dismissing the counter-claims are affirmed with one bill of costs in this court to the appellee.

On the same day, to wit, June 1, 1937, the following Judgment and Final Decree was entered:

JUDGMENT AND FINAL DECREE.

June 1, 1937.

This cause came on to be heard April 27, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 1, 1937, here ordered, adjudged and decreed as follows: The judgments of the District Court in the law actions are affirmed. The decrees in the equity suits and dismissing the counter-claims are affirmed with one bill of costs in this court to the appellee.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 19, 1937, the following Petition for Rehearing was filed by appellants by leave of court:

PETITION FOR REHEARING.

[Filed June 19, 1937, by leave of Court.]

Now come the appellants in the above-entitled cases (consolidated for purposes of appeal in this court) and say that this Honorable Court (Bingham, Wilson and Morton, JJ.) has handed down an opinion in said cases affirming the judgments and decrees of the District Court for the District of Massachusetts.

Said appellants present this their petition for rehearing on the above-entitled cases for the following reasons:

Set out below are two paragraphs respectively appearing on pages 7 and 8 of the opinion of the Court:

> "If, therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found that the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety. Hookway v. First National Bank, 36 Fed. (2) 166, 170; McMullen v. Hoffman, 174

U. S. 639. There is no allegation in the declarations at law that the receiver based his grounds of action on any alleged deception of, or injury to, any creditors of the Bank, or that any creditors were directly or indirectly injured by the giving of the surety bonds, nor does the receiver allege that he is suing on account of any creditors so injured."

"As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings."

From the foregoing it appears that the court affirmed the action of the District Court primarily, if not solely, on the ground that the actions at law sought only to enforce contracts which the Court ruled, on the facts found, could not be enforced either by the Bank or by its receiver. The Court appears to have overlooked the fact that the Standard Surety & Casualty Company of New York filed bills in equity seeking the cancellation and surrender of the several bonds and that in each such case in equity the receiver incorporated in his answer to the bill of complaint a counterclaim coupled with general prayers for relief reading as follows:

"(1) That the Court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its Receiver, and order the plaintiff to pay the same with interest.

"(2) For such further relief as the Court finds meet and just" (R. pp. 195, 231, 253, 275).

It is submitted that, even if the actions at law on the contracts contained in the several bonds could not be enforced for the reasons stated in said opinion, the receiver is entitled to whatever relief in equity may be appropriate in aid of the execution of his trust for the benefit of the depositors of his bank; that the depositors were found by the master to have suffered loss by reason of the conduct of the agent of the Surety Company, and that, therefore, such damage can upon the pleadings and the findings in the record, be the subject of decrees in favor of the receiver.

Wherefore the appellants respectfully pray that a rehearing of said cases be granted.

By their Attorneys,

GOODWIN, PROCTOR & HOAR,
ROBERT E. GOODWIN,
Attorneys for Petitioners, Appellants.

CERTIFICATE.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. JUNE 19, 1937.

I, Robert E. Goodwin, of counsel for the petitioners, appellants, hereby certify that the above petition is presented in good faith and not for purposes of delay.

ROBERT E. GOODWIN.

Thereafter, to wit, on June 29, 1937, the following Opinion of the court on Petition for Rehearing was filed:

OPINION OF THE COURT ON PETITION FOR REHEARING.

June 29, 1937.

PER CURIAM. The defendants in the equity suits seek to have a rehearing on the ground that in their counterclaim in their answers to the several equity suits they asked the court to determine the amount due from the Standard Surety & Casualty Company to the Boston-Continental Bank and to its receiver.

The petition should be denied. The law actions were brought on certain bonds executed by an agent of the defendants, and the equity suits were brought by the defendants to cancel the bonds.

The issue raised by the pleadings was as to the validity of these bonds as binding obligations in the hands of the receiver. No other issue was raised or tried than the validity of these bonds, except the question of an election of remedies.

The plaintiffs cite their prayer in their petition for rehearing, but a prayer must follow the allegations in the complaint or counterclaim. The plaintiffs' counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested.

The plaintiffs in their brief filed in this court say: "Amendment of the pleadings have made the issues raised in the three law actions identical with the issues raised in the equity cases based on the same bonds."

The master evidently so understood the issue. In the opening paragraph of his report he states:

"These seven cases raise the question whether the Standard Surety & Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston Continental National Bank upon four bonds written in the name of the Surety Company by its attorney in fact, Percy G. Cliff. . . . Amendments of the pleadings have made the issues raised in the law and equity cases identical."

At the conclusion of his report he says, after a finding as to the amounts due in the law cases:

"As to the prayers of the Surety Company, all bills in equity should be dismissed. As to the prayers of the receiver, the Westchester case (Eq. No. 3851) should be dismissed, but in the other three cases a decree should be entered ordering the company to pay to the receiver the *amounts specified.*" (Italics supplied.)

The District Court so understood the issues. In his memorandum of decision he says:

"As stated by the master and auditor, these seven cases raise the question whether the Standard Surety & Casualty Company of New York is liable to the receiver of the Boston Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company seeks to have the bonds cancelled; the receiver counterclaims upon the bonds. The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds. Amendments of the pleadings have made the issues raised in the law and equity cases identical."

No issue is raised in the plaintiffs' brief except as to the validity of the bonds. The obligations of the Surety Company based on

the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiffs' counterclaim in the equity suits.

The petition for rehearing is denied.

On the same day, to wit, June 29, 1937, an order denying said petition for rehearing was entered.

Thereafter, to wit, on July 2, 1937, upon motion by appellants, mandate was stayed until further order of court.

CLERK'S CERTIFICATE.

I, Roger A. Stinchfield, Deputy Clerk of the United States Circuit Court of Appeals for the First Circuit, and, during the temporary absence of the clerk, in charge of the clerk's office of said court and custodian of its files and records, certify that the printed pages numbered 1 to 293, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 2, 1937, in the cause in said court numbered and entitled:

No. 3231.

FREDERICK S. DEITRICK, RECEIVER, ET AL., APPELLANTS,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of July, A. D. 1937.

ROGER A. STINCHFIELD,

[SEAL] *Deputy Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 28 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al.*,
Petitioners,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK,
Respondent.
(And Six Other Actions Consolidated Therewith)

PETITION FOR WRIT OF CERTIORARI.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
Attorneys For Petitioners.

GEORGE P. BARSE,
JAMES LOUIS ROBERTSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al.*,
Petitioners,

v.

STANDARD-SURETY & CASUALTY CO. OF NEW YORK,
Respondent.
(And Six Other Actions Consolidated Therewith)

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show to this Honorable Court as follows:

Description of the Parties and Proceedings.

One of the petitioners, Frederick S. Deitrick, is the Receiver of the Boston-Continental National Bank, an insolvent national banking association which was closed by order of the Comptroller of the Currency on December 17,

1931 (R. 44). Said Bank is the other petitioner. The Bank was established in December 1930 by the consolidation of the Boston National Bank and the Continental National Bank. The petitioner Bank was located in Boston in the District of Massachusetts.

The respondent Standard Surety & Casualty Co. of New York is a New York corporation engaged in the business of writing surety and guaranty bonds and other like obligations and conducted its business in Boston through its attorney-in-fact, one Percy G. Cliff, acting under a written power of attorney. The respondent will be referred to as the "Surety Company".

When the bank suspended business it held four so-called "note guaranty bonds" executed by the Surety Company as guarantor in favor of the Bank as obligee, securing the payment of various notes executed by borrowers from the Bank.

The three actions at law were brought by the Receiver upon three of the aforesaid bonds (R. 43).

The four suits in Equity were brought by the Surety Company against the Receiver and the Bank and sought the cancellation and surrender of these several bonds on the ground that the Surety Company's agent acted in fraud of his principal in giving the bonds and his fraud was known to the president of the Bank. The Receiver, in his answers to the bills of complaint in the Equity cases, counterclaimed on each bond (R. 43).

All of the cases were consolidated for trial and the Master and Auditor made a single report, concluding and recommending that the Receiver should recover on three of the bonds (R. 42-129). The cases were consolidated for all purposes of appeal. (R. 146).

In both the United States District Court (R. 139-141) and the Circuit Court of Appeals for the First Circuit (R. 281-289), the Receiver was denied relief in all of the cases and decrees were ordered directing the surrender and cancellation of the several bonds.

The Matter Involved.

The facts as found by the Master and Auditor (R. 42-129) are summarized in the supporting brief submitted herewith. By stipulation the findings of the Auditor are final (R. 27, 139, 282).

The question presented is whether a receiver of an insolvent national bank stands better than the bank itself with respect to the enforcement of obligations (in the instant case the obligations were "note-guaranty bonds") which

(a) were given to the bank, as a part of a scheme to defraud, upon an understanding between the maker thereof (acting through an agent, in the cases at bar) and a fraudulent bank official that the obligations would be used only to exhibit to the national bank examiners and other interested persons so as to give notes secured thereby the appearance of sound and enforceable assets and would be surrendered later to the maker;

(b) were exhibited to the bank examiners and relied upon by them as genuine, with resulting loss to depositors by reason of the consequent concealment of the unsound condition of the bank;

(c) were exhibited to the bank directors and relied upon by them as genuine, with resulting loss to depositors by reason of the consequent concealment of the unsound condition of the bank; and

(d) were executed without known monetary consideration, by an agent of the maker acting in the premises under a written power of attorney of unlimited scope which was likewise exhibited to and relied upon by the bank examiners as proof of the agent's authority in accordance with the intention of the principal that the power should be so exhibited to all persons having occasion to rely upon the agent's signature.

The Circuit Court of Appeals for the First Circuit ruled that the Receiver could not recover upon the obligations,

because (1) a fraudulent officer of the bank (acting in collusion with the promissor's agent in a scheme to defraud the bank) knew that the agent was acting in fraud of his principal; and (2) that such knowledge was to be imputed to the bank; and (3) that under such circumstances the receiver stands no better than the bank itself (R. 281-293).

The Circuit Court of Appeals for the First Circuit recognized the existence of decisions of various state courts to the contrary, but appears to hold the opinion that the rule of law as to the status of a receiver of a national bank, as above stated, is a rule binding on the federal courts because of the decisions in the cases of *Scott* v. *Armstrong*, 146 U. S. 499; 36 L. Ed. 1059; *Fourth Street National Bank* v. *Yardley*, 165 U. S. 634; 41 L. Ed. 855; and *Rankin, Receiver*, v. *City National Bank*, 208 U. S. 541; 52 L. Ed. 610.

Reasons Relied Upon for Allowance of the Writ.

The petitioner submits that:

1. The ruling of the Circuit Court of Appeals (as decisive of the rights of the parties) that a receiver of a national bank stands no better than the bank itself with respect to the enforcement of obligations acquired by the bank prior to receivership involves an important question of law **which has not been but should be settled by this court.**

We will endeavor to show in the brief accompanying this petition that the three decisions of this court relied upon by the Circuit Court of Appeals do not hold as a rule of law that a receiver of a national bank is to be denied recovery on obligations held by his bank merely because the bank itself could not have recovered thereon.

2. The ruling of the Circuit Court of Appeals is in conflict with decisions of this Court recognizing the principle that a receiver of a bank may have rights with respect to third parties superior to the rights of the bank itself. See

Texas and Pacific Railway Co. v. *Pottorff*, 291 U. S. 245. 78 L. Ed. 777, and other cases discussed in the brief accompanying this petition (pp. 17, 18).

3. The question of law here involved has been the subject of conflicting opinions among the several Circuit Courts of Appeals and is one with respect to which there should be a uniform rule in the various Federal courts.

4. The ruling of the Circuit Court of Appeals is in conflict with the weight of authority in that an overwhelming majority of the highest courts of the several states have adopted a position directly contrary to that taken by the Circuit Court of Appeals in the instant case.

5. The question of Federal law decided by the Circuit Court of Appeals is one of substantial public importance, inasmuch as it relates to the broad question of the rights of receivers of national banks in cases where bank officers have conspired with third parties to defraud the bank and its depositors by having obligations, prima facie valid and enforceable, (but intended otherwise by private agreement between the conspirators) given to the bank for the purpose of deceiving the bank examiners and the Comptroller of the Currency, thus enabling the bank to remain open for business when it otherwise would be closed for the protection of its creditors.

Wherefore Your Petitioners Respectfully Pray:

That a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the cases at bar to the end that the judgments and decrees of the Circuit Court of Appeals may be reviewed by this

Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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GEORGE P. BARSE,
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Attorneys for the Comptroller of the Currency,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al.*,
Petitioners,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK,
Respondent.
(And Six Other Actions Consolidated Therewith)

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER, AND BOSTON-CONTINENTAL NATIONAL BANK, PETITIONERS.

Opinions Below

The opinion of the United States District Court is not reported. It appears in the record at pages 139-141.

The opinion of the Circuit Court of Appeals for the First Circuit bears date of June 1, 1937, appears in the Record at pages 279-288, and is reported in 90 F. (2d) 862.

The opinion of the Circuit Court of Appeals for the First Circuit denying a petition for rehearing appears in the Record at pages 291-293 and is reported in 90 F. (2d) 862, 866. The order denying the petition for rehearing was entered June 29, 1937 (R. 293).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress approved February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347(a).

Statement of the Case.

The three actions at law (R. 42, 43) were brought in the United States District Court for the District of Massachusetts by John B. Cunningham, as Receiver of the Boston-Continental National Bank, an insolvent national banking association which was closed by order of the Comptroller of the Currency on December 17, 1931, and were prosecuted by successive receivers of said bank, of which the petitioner Frederick S. Deitrick is the last in order of succession and now holds said office. The defendant in each of the actions at law is Standard Surety & Casualty Co. of New York (hereinafter referred to as the "Surety Company"). In these actions the receiver sought to recover on three so-called "note-guaranty bonds" executed by the Surety Company as co-obligor with three separate borrowers from the bank, namely Westchester Discount Corporation, one Stone and one Robinson. The Bank was the obligee in each of the bonds. The bonds purported to guarantee the payment of certain notes of the respective borrowers, all of which proved to be uncollectible.

The four equity cases (R. 42, 43) were brought by the Surety Company against the Bank and its receiver and sought the cancellation of the three note-guaranty bonds above referred to and also of a fourth bond of similar tenor given to secure the payment of the note of one Cronin. In each of the equity suits the receiver in his answer counterclaimed on each of the bonds.

The actions at law were referred to an Auditor and the suits in equity were referred to the same party as Master (R. 26, 27). The cases were consolidated for trial and the

Master and Auditor made a single report (R. 42-129), wherein he concluded and recommended that the Surety Company be held liable to the Receiver on three of the bonds. However, the United States District Court ordered judgment for the defendant in the three actions at law; disallowed the receiver's counterclaim in the suits in equity; and ordered decrees in favor of the Surety Company directing the surrender and cancellation of the bonds (R. 141).

On appeal to the Circuit Court of Appeals the judgments and orders of the District Court were affirmed (R. 288).

By order of the District Court the cases were consolidated for all purposes of appeal (R. 147).

The pertinent facts as found by the Master and Auditor (R. 42-129) are briefly as follows:

Ragan, President of the Boston-Continental National Bank, herein referred to as "Bank", and previously President of the predecessor Continental National Bank, was engaged in a scheme to defraud the banks for his own dishonest ends. For this purpose he enlisted the aid of one, Percy G. Cliff, who was the attorney-in-fact of the respondent Surety Company for the Boston district (R. 45) and duly licensed to conduct its business in the State of Massachusetts (R. 54). The Surety Company had given to Cliff a general and unlimited power of attorney which authorized him to execute and deliver in the name of the Surety Company and under its corporate seal, various kinds of bonds and undertakings, including the type of note-guaranty bonds given as above stated (R. 93-95). The Surety Company furnished Cliff with its corporate seal (R. 54), printed forms, stationery, and other materials suitable for the writing of bonds and other obligations, and gave him multiple originals of his power of attorney, duly certified and authenticated by the officials of the Surety Company (R. 45, 46).

The bonds were executed and delivered by Cliff at the suggestion or request of Ragan, the Bank's President, for

the avowed purpose of exhibiting the same to the bank examiners (R. 45, 104), to the end that the promissory notes given by Cronin, Stone, Robinson and Westchester Discount Corporation (having an aggregate face value of approximately $120,000) might appear to be adequately secured because of the existence of the guaranty bonds (R. 54). Ragan knew that in writing these particular bonds Cliff was violating certain private instructions from his principal (R. 47), although the terms of his power of attorney were sufficiently broad and general to authorize his writing bonds of this type (R. 54). Cliff knew the fraudulent character of his act (R. 54) but his motive for participating in the fraud was not disclosed. However, the surety does not deny that notwithstanding these circumstances the power of attorney was sufficiently broad to cover the type of bond here in question.

It was the intention of the Surety Company that the general power of attorney should be exhibited to persons dealing with Cliff (R. 46). Duplicate originals of the power, furnished by the Surety Company for the purpose, were attached to two of the bonds (R. 46, 49) and were examined and relied upon by the bank examiners as proof of Cliff's authority in the premises (R. 54, 55).

All of the bonds were exhibited to the bank examiners from time to time and were relied upon by them as being genuine (R. 55, 58), with the result that the true condition of the Bank was concealed from the Comptroller and his examiners thus temporarily forestalling vigorous action by the Comptroller of the Currency to protect the depositors and prevent losses to potential new depositors (R. 59).

But for the existence of the note-guaranty bonds and reliance thereon by the directors, bank examiners and Comptroller, the Bank's unsound condition would have been discovered at a much earlier date, and the losses of the depositors would have been minimized (R. 59).

The directors of the Bank were not parties to the fraud and knew nothing of the infirmities surrounding Cliff's

action in executing and delivering the bonds in question. The bonds were exhibited to the directors when the loans in question were under discussion for approval, extension or renewal from time to time (R. 53). Ragan made all of the loans in question without prior consultation with the board of directors, but all of the loans were approved by the board at subsequent dates in reliance upon the bonds and renewals and extensions thereof were likewise approved (R. 53). No officer or employee of the bank, except Ragan, knew of any infirmity in the bonds (R. 53).

At the time each of the bonds was given, Ragan (The Bank's president) assured Cliff (the Surety Company's agent) that the bonds were to be used only as "window-dressing" (R. 49); that they would never be enforced by the Bank; and that they would be returned to Cliff in due time after they had served their purpose of deceiving the examiners (R. 49, 50, 52, 54). It was understood between Cliff and Ragan that Cliff would not report the writing of the bonds to his home office and would not bill any premiums to the principal obligors on the bonds (R. 45). Furthermore, Ragan, at the time each bond was delivered, or shortly thereafter, gave Cliff a written release respecting each bond, which he signed as president of the Bank (R. 47, 50, 52).

The proceeds of three notes secured by three of the aforesaid bonds apparently were used for the actual benefit of persons other than Ragan (R. 44, 50, 51).

The bond given to secure the obligation of the Westchester Discount Corporation in the penal sum of $40,000 was given at the request of Ragan, prior to the consolidation of the Boston National Bank and the Continental National Bank, and Ragan disclosed to Cliff the fact that the money loaned on the note of Westchester Discount Corporation was to be used by Ragan to purchase additional shares in the Boston-Continental National Bank at a time when the merger between the Boston National Bank and the Continental National Bank was under consideration for

the purpose of forming the Bank which is one of the petitioners herein. In connection with this merger the Comptroller of the Currency had insisted that the capital structure of the consolidated bank must be re-enforced by the issue of new stock and Ragan required $40,000 for the purpose of paying his cash subscription for such new stock (R. 49).

When the Bank closed its doors all of the bonds in question were in the files of the Bank and the notes secured thereby were unpaid in substantial amounts. The depositors of the bank have suffered severe loss (R. 60) and many of the deposits were made after the fraudulent execution of the bonds and the reliance thereon by the examiners and Comptroller of the Currency (R. 59).

Specification of Errors.

The Circuit Court of Appeals for the First Circuit erred in ruling:

(1) That all defenses available against a national bank are available against its receiver after the bank has become insolvent, on the theory that such receiver stands no better than the bank itself.

(2) That since Ragan (the Bank's president) knew that Cliff (the Surety Company's agent) was acting in fraud of his principal and violating the latter's instructions in executing the bonds, such knowledge on Ragan's part is to be imputed to the Bank with the result that the Receiver cannot recover on the bonds.

(3) That no estoppel arises in favor of the receiver, even though: (a) Cliff's written and publicly disclosed power of attorney included authority to write bonds of this type; (b) he gave said bonds with the intent that they should appear to be valid and enforceable obligations of the Surety Company in favor of the Bank; (c) he intended that the bonds should be shown to the bank examiners, bank directors and

other interested persons, and relied upon by them as valid obligations of his principal; (d) the duplicate originals of Cliff's power of attorney were furnished to him by the Surety Company for the purpose of having them shown or delivered to third parties dealing with Cliff as proof of his unlimited authority; (e) the bank examiners saw and relied upon the bonds and the power of attorney; (f) the bank examiners failed to seasonably discover the unsound and eventually insolvent condition of the Bank because of such reliance; and (g) the Bank's depositors and other creditors suffered loss because of such reliance.

Summary of Argument.

The Circuit Court of Appeals has held that a receiver of an insolvent national bank cannot recover on obligations held by the bank, which were given to the bank for the purpose of having the same appear to be sound, valid and enforceable obligations, because such obligations were given to the bank under such circumstances that the bank itself could not have recovered thereon had it continued as a going concern.

The petitioners do not admit that Ragan's knowledge can be imputed to the bank so as to have prevented it from recovering on the "note-guaranty bonds" if it had continued as a going concern. However, assuming that point for purposes of argument, the petitioners contend that in ruling that a receiver stands no better than the bank the Circuit Court of Appeals for the First Circuit erroneously construed language contained in decisions of this Court as establishing the rule which it applied, and disregarded decisions of this Court which recognize that the rights of a receiver under certain circumstances are greater than those of the bank. The conflict of opinion between the several Circuit Courts of Appeals and between the highest courts of the several states together with the public importance of the question presented warrants a review by this Court.

ARGUMENT.

I.

This Honorable Court Has Never Held that a Receiver of an Insolvent National Bank Cannot Recover on Obligations Held by the Bank, Which Were Given to the Bank for the Purpose of Having the Same Appear to be Sound, Valid and Enforceable Obligations, Simply Because the Obligations Were Given to the Bank Under Such Circumstances that the Bank Itself Could Not Have Recovered Thereon Had It Continued as a Going Concern.

The case of *Scott* v. *Armstrong,* 146 U. S. 499; 36 L. Ed. 1059 (1892) contains a statement as to the status of the receiver of a national bank, which appears to have been relied upon by the court below as stating a general and all-inclusive rule of law applicable to receivers of national banks. This dictum at p. 507 reads as follows:

> "* * * The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

A study of the decision discloses that this language was wholly sound as applied to the facts and issues in that case, but it was used in an opinion which dealt only with the right of set-off with respect to debits and credits in settling the claim of a depositor in a closed bank. No questions of fraud practiced on the bank or of intention to deceive the bank examiners, the depositors or the public, were involved. It is respectfully submitted that in using the above quoted language the Court was not attempting to state a general principle of law applicable to receivers of national banks covering all circumstances.

The case of *Rankin, Receiver*, v. *City National Bank*, 208 U. S. 541; 52 L. Ed. 610 was also relied upon by the Circuit Court of Appeals for the First Circuit as being decisive in the cases at bar.

In that case a bank examiner had complained of excessive loans made by the Guthrie Bank. Billingsley, president of the said bank, advised the cashier of the City Bank of this fact and requested that the City Bank take his personal note and credit the Guthrie Bank with the proceeds under an agreement that the proceeds would be kept in a special account not subject to check and available at all times for offset against the note. The credit thus established in favor of the Guthrie Bank enabled it to eliminate the excessive loans. Subsequently, but before the closing of the Guthrie Bank, the note was charged against the special account by the City Bank as per agreement. The Receiver of the Guthrie Bank sued the City Bank on the theory that the special account was an asset of the Guthrie Bank and not subject to offset against the note of Billingsley. It will be observed that the transaction between the two banks had been fully closed by the offsetting of the note against the special account in the name of the Guthrie Bank in strict conformity with the agreement made between Billingsley and the City Bank and in so far as the City Bank was concerned the arrangement was not in furtherance of any conspiracy to defraud the Guthrie Bank.

In that case Mr. Justice Holmes speaking for the Court said at p. 546:

> "* * * If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

It is submitted that in using this language Mr. Justice Holmes did not intend that the words should be construed other than as applicable to the particular facts of the case under consideration.

A careful reading of the decision in the Rankin case shows that none of those special elements of fact were

present which are the basis of those decisions which favor the Receiver's position in the cases at bar, so that there was no occasion for the Court to consider the legal effect of the giving of an obligation to a bank with the **intention on the part of the maker** that it should be used for the purpose of exhibition to the bank examiners and directors, to the end that they might regard it as a sound and enforceable obligation securing an asset of the bank. There is not the slightest indication in the Rankin case that the existence of the credit supplied by the defendant City Bank in any way operated to keep the Guthrie Bank open for any period of time. It is significant to note that in contrast to the instant case no one was injured by the transaction with the City Bank because the notes representing the excessive loans remained the property of the Guthrie Bank. Any loss thereon was sustained prior to the transaction with the City Bank. In the instant case the granting of the loans and the original approval thereof by the directors of the bank was based upon the fraudulent transactions of Ragan and Cliff.

It is submitted, therefore, that the Rankin case is not an authority for the general proposition of law for which it appears to have been cited by the Circuit Court of Appeals for the First Circuit and is, in fact, inapplicable to the cases at bar.

The Circuit Court of Appeals also cited in support of its ruling above referred to the case of *Fourth Street National Bank* v. *Yardley*, 165 U. S. 634; 41 L. Ed. 855. That case held that where an equitable lien upon certain assets of an insolvent national bank existed prior to the closing of the bank the receiver took the assets subject to the lien. No question was involved of intent to deceive the bank examiners or to give the bank an obligation which appeared to be enforceable but was coupled with an understanding that it would not be enforced, and, therefore, the case is not applicable to the questions of law presented in the instant case.

II.

This Honorable Court Has Decided that a Receiver of a National Bank Has Certain Rights With Respect to Third Parties Superior to the Rights of the Bank Itself.

In the case of *Texas & Pacific Railway Co.* v. *Pottorff, Receiver,* 291 U. S. 245; 78 L. Ed. 777 (1934), it was held that a depositor could not enforce against the receiver of a national bank a contract under which the bank had agreed to segregate certain of its securities and hold the same as collateral to secure the repayment of the customer's deposit. In that case the receiver was held not to be bound by the agreement as to security and the depositor was left in the position of an unsecured creditor of the bank. This Court speaking through Mr. Justice Brandeis therein stated at page 260:

> "But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.
> "* * * The receiver may assert the invalidity of the pledge without making restitution by paying the pledgee's claim in full."

See also *City of Marion* v. *Sneeden, Receiver,* 291 U. S. 262; 78 L. Ed. 787 (1934).

This court has held that stockholders of defunct national banks are liable for the payment of stock assessments, even though their shares had been purchased in reliance upon grossly fraudulent misrepresentations as to the condition of the banks made by officers of the banks for the purpose of inducing the stockholders to purchase shares from the banks. See *Scott* v. *Dewecse, Receiver,* 181 U. S. 202, 213;

45 L. Ed. 822 (1901), and *Lantry* v. *Wallace, Receiver,* 182 U. S. 536, 550, 551; 45 L. Ed. 1218 (1901). In each of those cases the bank itself was the vendor of the stock and the fraudulent misrepresentations were made by officers of the bank who had been duly authorized to sell the shares in question. As a result of the decision in those two cases the receivers were held entitled to enforce, for the benfit of the banks' creditors, obligations which were imposed upon these stockholders as a result of the fraudulent acts of the banks' own officers. Also see *Oppenheimer* v. *Harriman National Bank and Trust Company,* 301 U. S. 206, 81 L. Ed. 663, 667.

This Court has recently held that the receiver of a private corporation (as distinguished from a national banking association) may recover from fraudulent promoters and that in so recovering the receiver acts as the representative and for the benefit of the creditors of the corporation. See *McCandless* v. *Furlaud, et al.,* 296 U. S. 140, 160; 80 L. Ed. 121 (1935).

The decision in that case appears to be an express recognition of the legal principle that where fraud is involved a receiver, acting as the representative of creditors and for their benefit, may enforce rights which the corporation itself could not have enforced.

III.

There is a Conflict of Authority Between the Federal Courts of the Several Circuits With Respect to the Question of Whether a Receiver of an Insolvent National Bank May Recover on Obligations Held by His Bank Upon Which the Bank Itself, as a Solvent Going Concern, Could Not Have Recovered.

The conflict of opinion is reflected not only in the decisions of the several Circuit Courts of Appeals but also in the decisions of United States District Courts. It has, therefore, been deemed advisable to present the conflict of opinion by discussing sequentially the group of

cases which appear to support the position taken by the respondents including the cases relied upon by the Circuit Court of Appeals for the First Circuit and then the group of cases which sustain the position taken by the petitioners under the following headings:

A. *Discussion of the decisions of the Federal Courts which appear to support the position taken by the respondents, including the decisions cited by the Circuit Court of Appeals in the cases at bar.*

The Circuit Court of Appeals cited *Cutler* v. *Fry*, 240 Fed. 238 (D. C. Kan.) (1915); *Yates Center National Bank* v. *Schaede*, 240 Fed. 240 (D. C. Kan.) (1915); *Yates Center National Bank* v. *Lauber*, 240 Fed. 237 (D. C. Kan.) (1915). These cases were all decided by the same court on the same day and appear to rest upon the court's interpretation of the case of *Rankin* v. *City National Bank, supra.* Judge Pollock who wrote the opinions expressed reluctance that he must come to such a conclusion. He recognized the existence of the contrary doctrine, as laid down in the case of *Pauly* v. *O'Brien*, 69 Fed. 460, but appears to have felt compelled to deny the receiver the right to recover because of the holding of the Rankin case. The rationale of Judge Pollock's decision appears to be that the receiver cannot have the benefit of a promise contained in a note without assuming the burden of the bank's counter-promise that the note will not be enforced.

Since the decisions in these three District Court cases, however, this Honorable Court has decided that a receiver may have the benefits of a contract without assuming its burdens. See *Texas & Pacific Railway Co.* v. *Pottorff, Receiver, supra,* and *City of Marion* v. *Sneeden, supra.*

The case of *Skud* v. *Tillinghast, Receiver*, 195 Fed. 1 (C. C. A. 6) (1912) also cited by the Circuit Court of Appeals does not definitely lay down the broad rule of law which the Circuit Court of Appeals in the cases at bar appeared to assume to be a uniform rule in the Federal

Courts. Furthermore, in reaching its decision the court stated that it did not appear that Skud, the maker of the note, acted with any fraudulent intent or had in any way connived with the officers of the bank in any wrongdoing.

The case of *Peterson* v. *Tillinghast, Receiver,* 192 Fed. 287 (C. C. A. 6) (1911) was also cited by the Circuit Court of Appeals in the cases at bar. In this case Peterson had given his note payable to the bank at the request of an officer of the bank upon the express understanding that it was given for the accommodation of the bank and was to be used only for discounting at another bank to raise funds for the accommodated bank. The accommodated bank did not discount it, but held the note, which was in its possession when the receiver took over the bank's affairs. While the Rankin case is cited as laying down a rule of general application respecting the rights of a receiver of a national bank, it is clear that the decision really turns on the law of negotiable instruments. Inasmuch as the bank, as the accommodated payee of the note, never negotiated it to a third party, the maker could not be held liable thereon to the accommodated payee. It was expressly found that Peterson, the maker, gave the note in good faith and with no intent to deceive or aid in any fraud.

The Circuit Court of Appeals also cited as authority for its ruling the cases of *Burrowes* v. *Nimocks,* 35 F. (2) 152 (C.C.A. 4) (1929) and *Schumacher* v. *Eastern Bank & Trust Co.,* 52 F. (2) 925 (C.C.A. 4) (1931). Both of these cases dealt with the question of whether the receiver of a national bank was bound by an agreement with a depositor whereby the bank gave collateral to secure a loan or deposit. In the Schumacher case the court found as a fact that the transaction between the defunct bank and the defendant bank (Eastern Bank & Trust Co.) involved a loan and not a deposit, and held that the defunct bank had a right to pledge its assets to secure the loan. In the Burrowes case the defunct bank had pledged certain of its assets to secure a deposit of county funds. The court held

that in so doing the officials of the defunct bank acted within their legal authority and that since the bank itself was bound by its agreement with its depositor, the receiver likewise was bound.

Both of those cases were decided prior to the year 1934, when this Honorable Court decided the cases of *Texas & Pacific Railway Co.* v. *Pottorff, Receiver, supra,* and *City of Marion* v. *Sneeden, Receiver, supra,* which held that where a national bank has no authority to pledge its assets to secure a deposit, a receiver of the bank may reclaim the collateral and leave the depositor in the position of an unsecured creditor. Therefore, the above decisions of the Circuit Court of Appeals for the Fourth Circuit have been overruled in principle in so far as they held that a receiver's rights are no greater than those of his bank.

The case of *Keyes* v. *First National Bank of Aberdeen,* 20 F. (2) 678 (D. C. S. D.) (1927) also cited by the Circuit Court of Appeals, appears to turn on its particular facts which are in no way comparable to the facts in the cases at bar and do not involve the question of law here under consideration.

The decisions in the following cases (not cited by the Circuit Court of Appeals in the cases at bar) appear to hold to the view of law entertained by the Circuit Court of Appeals for the First Circuit; *Hookway* v. *First National Bank,* 36 F. (2) 166 (C.C.A. 8) (1929), *Andresen* v. *Kaercher,* 38 F. (2) 462 (C.C.A. 8) (1930), *Kaercher* v. *Citizens' National Bank,* 57 F. (2) 58 (C.C.A 8) (1932), and *Bosworth* v. *Cady,* 72 F. (2) 62 (C.C.A. 7) (1934).

It is of importance to note that all of the above decisions were rendered in the Sixth, Seventh and Eighth Circuits, and that the highest state courts of Kansas, Nebraska, North Dakota, Minnesota, Missouri, Kentucky, Ohio, Illinois and Wisconsin, (which States were embraced in said circuits at the time the above decisions were rendered) have all adopted the rule of law contended for by the petitioners.

B. *Discussion of Decisions of Federal Courts which sustain the Petitioners' contentions in the cases at bar.*

The earliest Federal case sustaining the petitioners' position is *Pauly* v. *O'Brien*, 69 Fed. 460 (C. C. Calif.) (1895). In that case it was held that the receiver of a national bank could recover on a promissory note which the maker had given to the bank to take the place of a note, the maker of which had become insolvent. The bank did not surrender the insolvent's note, but carried it as collateral to the defendant's note. The defendant pleaded no consideration. The court said (pp. 461, 462):

> "It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act."

The doctrine contended for by the petitioners has been upheld in the Fourth Circuit in the case of *Federal Reserve Bank* v. *Crothers*, 289 Fed. 777 (C.C.A. 4) (1923). In that case a defendant executed a note to the bank at the solicitation of one Warburton, its president, who told the defendant that it was to be used to take the place of an equivalent principal amount of bonds of an electric light company owned by the bank, to which the bank examiners had objected. Warburton actually used the note in substitution for a note of a third party, which had been previously obtained by Warburton for the same ostensible purpose. Crothers received no consideration for the note and there was no evidence that the bank parted with anything in exchange for the note. The Circuit Court of Appeals for the Fourth Circuit ruled that the District Court should have instructed the jury to find for the plaintiff (the receiver of the bank). Mr. Circuit Justice Taft (then Chief Justice of this Honorable Court) sat on the case in the Circuit Court of Appeals as Circuit Justice and concurred in the opinion. In its opinion the court said:

> "Public policy requires that the maker be estopped from denying his liability under such circumstances."

A similar view of the law was taken by the Circuit Court of Appeals for the Fifth Circuit in the case of *Bohning* v. *Caldwell,* 10 F. (2) 298 (C.C.A. 5) (1925) Cert. Den. 271 U. S. 663, 70 L. Ed. 1139. This decision is of particular significance, inasmuch as in the course of the opinion the court referred to the case of *Pauly* v. *O'Brien, supra,* as stating the sound doctrine and also referred to the line of cases typified by the case of *Peterson* v. *Tillinghast, supra,* as appearing to hold the contrary view. The court held that the receiver could recover and as noted above this Honorable Court denied certiorari.

See also *Utley* v. *Clarke, et al.,* 16 Fed. Supp. 435 (D. C. N. D. N. Y.) (1936) which also adopted the view of the law here contended for by petitioners, after a review of the authorities on both sides of the question. In that case the court expressed itself as follows on page 439:

> "While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is estopped from asserting his claim as against depositors and other creditors."

From the foregoing it appears that there is a direct conflict of opinion in the several circuits on this important question and that the decision of the Circuit Court of Appeals for the First Circuit in the cases at bar has increased the existing confusion.

IV.

The Overwhelming Weight of Opinions of the State Courts Favors the Position Contended for by the Petitioner and is in Conflict With the Ruling of the Circuit Court of Appeals in the Cases at Bar.

The decisions in the following State Court cases adopt the rule of law here contended for. Those appearing in bold type contain particularly clear and persuasive statements of the rule.

ALABAMA: See *Day* v. *Farmers' & Merchants' Bank*, 229 Ala. 372, 376-377, 157 So. 439, 443-444 (1934)

COLORADO: **Murphy, Receiver** v, **Gumaer**, 18 Colo. App. 183, 70 Pac. 800, 802-803 (1902).

FLORIDA: *Ashley* v. *Rowe*, 101 Fla. 110, 133 So. 551, 552 (1931).

ILLINOIS: *Golden* v. *Cervenka*, 278 Ill. 409, 116 N. E. 273, 282, 283, (1917); *Niblack* v. *Farley*, 286 Ill. 536, 122 N. E. 160 (1919); *Boller* v. *Field*, 260 Ill. App. 488, 492 (1931); *Nelson* v. *Colegrove*, 265 Ill. App. 488 (1932).

KANSAS: *German-American State Bank* v. *Watson*, 99 Kan. 686, 163 Pac. 637 (1917); **Cedar State Bank** v. **Olson**, 116 Kan. 320, 226 Pac. 995, 997 (1924); *Hayes* v. *Addy*, 139 Kan. 481, 32 Pac. (2) 243, (1934); *Bell* v. *Johnson*, 142 Kan. 360, 46 Pac. (2) 886, (1935).

KENTUCKY: *Denny* v. *Fishter*, 238 Ky. 127, 36 S. W. (2) 864, (1931).

MARYLAND: See *New* v. *Page*, 144 Md. 606, 125 Atl. 403, 404. (1924)

MASSACHUSETTS: **Prudential Trust Co.** v. **Moore**, 245 Mass. 311, 139 N. E. 645, 647 (1923).

MINNESOTA: *Skordal* v. *Stanton*, 89 Minn. 511, 95 N. W. 449 (1903); **German-American Finance Corp.** v. **Merchants & Mfrs. Bank**, 177 Minn. 529, 225 N. W. 891, 893 (1929).

MISSOURI: *Third National Bank of St. Louis* v. *Reichert*, 101 Mo. App. 242, 73 S. W. 893, 896 (1903).

MONTANA: *State Bank of Moore* v. *Forsyth*, 41 Mont. 249, 108 Pac. 914, 919 (1910).

NEBRASKA: *Harrington* v. *Connor*, 51 Neb. 214, 70 N. W. 911 (1897).

NEW JERSEY: See *Schmid* v. *Haines*, 115 N. J. L. 271, 274, 178 Atl. 801, 803 (1925).

NEW YORK: **Hurd** v. **Kelley**, 78 N. Y. 588 (1879); **Best** v. **Thiel**, 79 N. Y. 15 (1879); *Sickles* v. *Herold*, 32 N. Y. S. 1083, 1085 (1895); **Bay Parkway Nat. Bank** v. **Shalom**, 270 N. Y. 172, 200 N. E. 685, 687 (1936).

NORTH DAKOTA: *Vallely* v. *Devaney*, 49 N. Dak. 1107, 194 N. W. 903, (1923); *Peterson* v. *Baird*, 63 N. Dak. 604, 249 N. W. 690 (1933).

OHIO: *State, ex rel. Lattanner* v. *Hills*, 94 Ohio St. 171, 113 N. E. 1045, 1047 (1916).

OKLAHOMA: *First National Bank* v. *Boxley*, 129 Okla. 159, 264 Pac. 184, 187 (1927).

OREGON: *Putnam* v. *Chase*, 106 Ore. 440, 212 Pac. 365 (1923).

PENNSYLVANIA: *State Bank of Pittsburg* v. *Kirk*, 216 Pa. 452, 65 Atl. 932; (1907); **Lyons** v. **Benney**, 230 Pa. 117, 79 Atl. 250, 251; (1911); *Warren National Bank* v. *Jamieson*, 301 Pa. 45, 151 Atl. 672; (1930).

SOUTH CAROLINA: **Arthur** v. **Brown**, 91 S. Car. 316, 74 S. E. 652, 654, (1912).

TEXAS: **Shaw** v. **Borchers**, 46 S. W. (2) 967, 969, 970, (Tex. Civ. App. (1932)).

UTAH: See *Riches* v. *Hadlock*, 80 Utah 265, 288, 15 Pac. (2) 283, 292, (1932).

VERMONT: *West Rutland Tr. Co.* v. *Houston*, 104 Vt. 204; 158 Atl. 69, 71-72 (1932).

VIRGINIA: See *Webb* v. *Pleasants*, 144 Va. 516, 519; 132 S. E. 175, 176 (1926).

WASHINGTON: *Moore* v. *Kildall*, 111 Wash. 504; 191 Pac. 394 (1920).

WISCONSIN: *Schwenker* v. *Teasdale*, 206 Wisc. 275, 239 N. W. 434, 437-438 (1931).

See also: *Allen* v. *Hay,* 64 Can. S. C. 76; 69 Dom. L. R. 193 (1922); (Note) 38 Harvard Law Review, 239; (Anno.) 64 A.L.R. 595, 601-605.

V.

Sound Public Policy Demands the Protection of Depositors and Creditors of Banking Institutions and the Public from Frauds Such as Are Involved in these Cases.

National Banks are governmental instrumentalities, *M'Culloch* v. *State of Maryland,* 17 U. S. 316, 436, 437; 4 L. Ed. 579 (1819), *Osborn* v. *Bank of the United States,* 22 U. S. 739, 861, 6 L. Ed. 204 (1824), and, therefore, the business of such banks is impressed with a public interest. See *German American Finance Corporation* v. *Merchants and Manufacturers Bank,* 177 Minn. 529, 225 N. W. 891, 893.

Consistent with the holdings of the courts in the above cases Congress has seen fit to take definite steps for the protection of the interests of the depositors of national banks and the public by reposing in the Comptroller of the Currency supervisory control over national banks under statutory provisions which prescribe certain restrictions and requirements. Among other things, each national bank must submit regular reports to the Comptroller disclosing the condition of the bank (12 U. S. C. 161), and all such banks are subject to examination by examiners of the Comptroller's office (12 U. S. C. 481).

If the Comptroller becomes satisfied of the insolvency of a national bank he may appoint a receiver and liquidate the assets thereof for the benefit of its creditors (12 U. S. C. 191).

In addition, Congress has imposed a duty upon the Comptroller to report to it any suggestions he may have relative to banking by which the system may be improved and by which the **"security of the holders of its notes and other creditors may be increased."** (12 U. S. C. 14). The

quoted phrase indicates a disposition on the part of Congress to regard national banks as so affected with a public interest as to require special measures for the protection of their creditors and the public.

These statutory sections are for the primary protection of the depositors and the public and are founded in a sound public policy. *United States National Bank of La Grande* v. *Pole,* 2 F. Supp. 153, 157 (D. C. Oregon) (1932).

As aforenoted, one of the methods employed by the sovereign to protect the interests of the public and depositors of national banks is by examinations made by the Comptroller through his examiners. Any rule of law which permits third persons to escape liability to the depositors and creditors of a bank (or a receiver acting for their benefit), where such persons have conspired with fraudulent bank officials to deceive the Comptroller, his examiners, and through them the public (and have in fact caused a loss to be sustained by the bank's creditors), by placing among the assets of the bank obligations prima facie valid and enforceable but concerning which the liability has been limited or voided by private secret agreement between the conspirators, defeats the entire purpose of the regulatory statutes and is in conflict with a sound public policy.

CONCLUSION.

The petitioners therefore respectfully submit that a writ of certiorari should issue as prayed for.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, et al., *Petitioners*,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent.*

(And Six Other Actions Consolidated Therewith)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, et al., *Petitioners*,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent*.

(And Six Other Actions Consolidated Therewith)

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER, AND BOSTON-CONTINENTAL NATIONAL BANK, PETITIONERS.

OPINIONS BELOW.

The opinion of the United States District Court is not reported. It appears in the record at pages 139-141.

The opinion of the Circuit Court of Appeals for the First Circuit appears in the record at pages 281-288, and is reported in 90 F. (2d) 862.

The opinion of the Circuit Court of Appeals for the First Circuit denying a petition for rehearing appears in the record at pages 291-293, and is reported in 90 F. (2d) 862, 866. The order of this court granting a writ of certiorari is reported in —— U. S. ——, 82 L. Ed. 102, 58 S. Ct. 143.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Congress approved February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347 (a).

STATEMENT OF THE CASE.

The petitioner, Frederick S. Deitrick, is the Receiver of the Boston-Continental National Bank, an insolvent banking association which was closed by order of the Comptroller of the Currency on December 17, 1931 (R. 44). The said Bank is the other petitioner and was established in December, 1930, by consolidation of the Boston National Bank and the Continental National Bank. The petitioner Bank is located in Boston in the District of Massachusetts.

The respondent, Standard Surety & Casualty Company of New York, is a New York corporation engaged in the business of writing surety and guaranty bonds and other like obligations, and conducted its business in Boston through its attorney-in-fact, one Percy G. Cliff, acting under a written power of attorney.

The respondent will be referred to as the "Surety Company", and the petitioner Bank and its predecessor, Continental National Bank, will be referred to as the "Bank". The Receiver, Frederick S. Deitrick and his predecessors in office, will be referred to as the "Receiver".

The three actions at law (R. 42, 43) were brought in the United States District Court for the District of Massachusetts by John B. Cunningham, as Receiver of the bank,

and were prosecuted by successive receivers of said Bank, of which the petitioner Frederick S. Deitrick is the last in order of succession and now holds said office. The Surety Company is the defendant in each of the actions at law. In these actions the Receiver sought to recover on three so-called "note-guaranty bonds" executed by the Surety Company as co-obligor with three separate borrowers from the Bank, namely, Westchester Discount Corporation, one Stone and one Robinson. The Bank was the obligee in each of the bonds. The bonds purported to guarantee the payment of certain notes of the respective borrowers, all of which proved to be uncollectible.

The four equity cases (R. 42, 43) were brought by the Surety Company against the Bank and its receiver, and sought the cancellation of the three note-guaranty bonds above referred to and also of a fourth bond of similar tenor given to secure the payment of the note of one Cronin. In each of the equity suits the Receiver and the Bank in their answers counterclamed on each of the note-guaranty bonds concerned (R. 194, 229, 252, 274).

The actions at law were referred to W. Barton Leach, Esquire, as Auditor under a stipulation that his findings of fact should be final, and the suits in equity were referred to the same party as Master (R. 26, 196). The cases were consolidated for trial and the Master and Auditor made a single report (R. 42-129). The Master and Auditor will be referred to collectively as the "Master".

The United States District Court ordered judgment for the defendant in the three actions at law; disallowed the Receiver's counterclaims in the suits in equity; and ordered decrees in favor of the Surety Company directing the surrender and cancellation of the bonds (R. 139-141). By order of the District Court all of the cases were consolidated for all purposes of appeal (R. 147).

The judgments and orders of the District Court were affirmed on appeal by the Circuit Court of Appeals (R. 289).

STATEMENT OF FACTS.

One Ragan was the President of the Boston-Continental National Bank and its predecessor Continental National Bank. He was engaged in a scheme to defraud the Bank for his own dishonest ends. For this purpose he enlisted the aid of Cliff, the Surety Company's attorney-in-fact for the Boston District (R. 45), who was duly licensed to conduct its business in the State of Massachusetts (R. 54). The Surety Company had given to Cliff a general and unlimited power of attorney which authorized him to execute and deliver in the name of the Surety Company with or without the impression of its corporate seal, various kinds of bonds and undertakings, including the type of note-guaranty bonds given as above stated (R. 93-95). The Surety Company had furnished Cliff with its corporate seal (R. 54,) printed forms, stationery, and other materials suitable for the writing of bonds and other obligations on behalf of the Surety Company and had also furnished him with multiple originals of this power of attorney, duly certified and authenticated by the officials of the Home Office of the Surety Company in New York (R. 46). Cliff's power of attorney in addition to granting unrestricted authority to execute "any and all bonds, recognizances, obligations, stipulations, undertakings, or anything in the nature of any of them which are or may be allowed, required or permitted by law, statute, rule, regulation, contract or otherwise" contained a clause of ratification reading as follows:

> "... and the Standard Surety & Casualty Company of New York hereby ratifies and confirms all that its said attorney-in-fact may lawfully do by virtue of these presents as fully and amply, to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York, New York, in their own proper persons."

Said power of attorney also recited that it was made in accordance with and by the authority of a resolution of

the Board of Directors of the Surety Company, which was set forth in full in the power of attorney. Said power of attorney with the authenticating documents annexed thereto are set forth in full as Exhibit B to the Master's Report (R. 93-95).

When Cliff executed and delivered the several bonds he was told by Ragan that they would be exhibited to the Bank Examiners (R. 45, 54, 104) for the purpose of satisfying them that the promissory notes given by Cronin, Westchester Discount Corporation, Stone and Robinson (having an aggregate face value of approximately $120,000.00) were adequately secured because of the contracts of guaranty set forth in the respective bonds (R. 54). Ragan knew that in writing these particular bonds Cliff was violating certain private instructions from his principal (R. 47), although the terms of his power of attorney were sufficiently broad and general to authorize him to write bonds of this type (R. 54). Cliff knew the fraudulent character of his act (R. 54), but his motive for participating in the fraud was not disclosed. The Surety Company does not deny that the terms of the power of attorney were sufficiently broad to cover the type of bond here in question. The Surety Company had furnished Cliff with the multiple originals of his power of attorney with the intention that they should be shown to persons having dealings with Cliff in his capacity of attorney-in-fact for the Surety Company (R. 46), and the Cronin and Westchester Discount Corporation bonds each had a multiple original of the power of attorney attached to it from the time that the bonds were delivered to the Bank (R. 46, 49). These originals of the power were seen by the Bank Examiners and relied upon by them as proof of Cliff's authority in the premises (R. 54, 55) and when the Examiners made inquiry of Cliff as to the genuineness of the several bonds he assured them that they were in all respects genuine.

All of the bonds were exhibited to the Bank Examiners from time to time and were relied upon by them as being

genuine (R. 54, 55, 58), with the result that the true condition of the Bank was concealed from the Comptroller and his examiners thus temporarily forestalling vigorous action by the Comptroller to protect the depositors and prevent losses to potential new depositors (R. 59).

But for the existence of the note-guaranty bonds and reliance thereon by the directors, bank examiners and Comptroller, the Bank's unsound condition would have been discovered at a much earlier date, and the losses of the depositors would have been minimized (R. 58, 59). The directors of the Bank were not parties to the fraud and knew nothing of the circumstances surrounding Cliff's action in executing and delivering the bonds in question. The bonds were exhibited to the directors when the loans in question were under discussion for approval, extension or renewal from time to time (R. 53). Ragan made all of the loans in question without prior consultation with the Board of Directors, but all of the loans were approved by the Board shortly after they were made in reliance upon the bonds, and renewals and extensions thereof were likewise approved (R. 53). No officer or employee of the Bank, except Ragan, knew of any infirmity in the bonds (R. 53).

At the time each of the bonds was given, Ragan assured Cliff that the bonds were to be used only "as window-dressing" (R. 49); that they would never be enforced by the Bank; that they would be returned to Cliff in due time after they had served their purpose of satisfying the Bank Examiners that the notes in question were amply secured and constituted sound assets of the Bank (R. 49, 50, 52, 54). It was understood between Cliff and Ragan that Cliff would not report the writing of the bonds to his Home Office and would not bill any premiums to the principal obligors on the bonds (R. 45). Ragan at the time each bond was delivered, or shortly thereafter, gave Cliff a written release respecting each bond and he purported to execute these releases as president of the Bank. (R. 47, 50, 52.) Ragan never returned the bonds to Cliff and they remained

in the files of the Bank along with the notes secured thereby until discovered by the Receiver. The notes secured by the bonds were unpaid in substantial amounts aggregating approximately $120,000.00. The total capital of the Bank was $1,000,000. (R. 55.) The depositors of the Bank have suffered severe loss (R. 60) and although an assessment has been levied upon the stockholders to the full extent of their liability, the assets of the Bank available for depositors and other creditors will not be sufficient to pay them in full even if the bonds here in suit are collected in full with interest. Many of the deposits in the Bank were made after the execution of the bonds and after the Bank Examiners had seen them and had relied thereon as genuine obligations of the Surety Company (R. 58, 59), and other depositors permitted their funds to remain on deposit after said time.

The facts as found by the Master surrounding each of the bonds are briefly as follows:

The Cronin Bond.

Ragan was indebted to one Arthur Cronin in an amount exceeding $20,000.00. Cronin in turn was indebted to Obrion, Russell & Company for a sum in excess of $19,000.00 and was being pressed for payment. Cronin's financial condition was poor and he had no substantial balance in his checking account. Cronin told Ragan that, unless Obrion, Russell & Company were paid, both he and Ragan would be in trouble. On August 23, 1930, Ragan handed a note of Arthur Cronin in the amount of $20,000.00 to Harold J. O'Donnell, discount clerk and assistant cashier in charge of the Loan Department of the Bank from August, 1930, to December 17, 1931, and told him to discount the note and credit the proceeds to Cronin's checking account. This was done (R. 45). The purpose of Ragan in making the loan to Cronin was to keep himself out of trouble.

Shortly after September 1, 1930, Cronin and Ragan had a talk with Percy Cliff, and Ragan urged Cliff to give a guaranty bond covering Cronin's obligation which could be used to deceive directors, bank examiners, and all others who might inquire, into believing that the Cronin loan was secured. Cliff signed and sealed the bond, attached to it an original of his power of attorney, and delivered it to Ragan shortly after the first of September, 1930, and at the time of delivery received a paper dated September 9, 1930, signed by Ragan as president of the Continental National Bank, purporting to release the Surety Company from any obligation upon the Cronin bond (R. 47).

Ragan delivered the bond to O'Donnell as collateral for the Cronin note. O'Donnell deposited the bond in the collateral files of the Bank, which were in his charge. Cliff did not know that this bond or others were delivered to O'Donnell (R. 47). The original Cronin note was renewed from time to time and payments were made on account. The last note was for $14,000.00 given December 9, 1931, maturing January 4, 1932, and has not been paid in whole or in part (R. 48).

On March 21, 1931, Cliff, at the solicitation of Cronin and Ragan, delivered to Ragan an endorsement signed by Cliff as attorney-in-fact for the Surety Company, purporting to extend the Cronin bond in the amount of $15,000.00 to May 22, 1931. Another endorsement was given on May 21, 1931, purporting to extend the bond in the amount of $15,000.00 to November 3, 1931. A third endorsement was given on November 3, 1931, purporting to extend the bond in the amount of $14,000.00 to November 3, 1932. Ragan handed all of these endorsements to O'Donnell (R. 49, 96). No releases were at any time delivered to Cliff in connection with the execution and delivery of the endorsements above referred to.

The third endorsement, given on November 3, 1931, extended the bond "in an amount not to exceed Fourteen Thousand Dollars ($14,000.00) or such portion thereof as

may remain unpaid on date of November 3, 1932", and further provided "in event of default on the part of the Principal, said Arthur D. Cronin of Boston, the obligee, the said Continental National Bank of Boston, shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail of such default" (R. 96). The Surety Company was notified within five days of November 3, 1932, by registered mail that Cronin had defaulted in payment in the amount of $14,000.00 and interest (R. 78).

The Westchester Bond.

In December, 1930, Ragan was attempting to accomplish a merger of the Continental National Bank and the Boston National Bank. In order to secure the Comptroller's approval of the merger it was necessary that ten thousand new shares of stock be subscribed for at $20.00 per share. Ragan told Cliff that he had to take up $40,000.00 of this stock; that if he failed to do it the banks would not be merged; that if the banks were not merged, the Continental National Bank might be closed by the bank examiners, in which event Cronin, Ragan, and Cliff would be ruined. He told Cliff that he wanted him to write a bond similar to the Cronin bond to secure a note of the Westchester Discount Corporation in the amount of $40,000., as the proceeds of this loan would enable him to take up the new stock and the bank examiners might not be satisfied with the Westchester loan without a bond (R. 49).

Ragan assured Cliff that the bond would be used only to deceive the bank examiners and others; that there would be no liability under the bond, and a release similar to the Cronin release would be given. Cliff gave the bond as requested, and attached to it an original of his power of attorney (R. 49).

This bond obligated the Surety Company to the Continental National Bank in the full and just sum of $40,000.00. The condition of the bond was the payment by Westchester

Discount Corporation of four notes, dated December 20, 1930, for $10,000.00 each, maturing at 30-day intervals beginning January 20, 1931. There never were any notes for $10,000.00 each made by Westchester Discount Corporation and held by the Bank. There was one note of the Westchester Discount Corporation of $40,000.00, dated December 23, 1930, maturing in four months (R. 49, 96, 97). Cliff received a release dated December 23, 1930, executed by Ragan for the Bank, which purported to release the Surety Company of all liability under the Westchester bond. Ragan after receiving the bond from Cliff, delivered it with the Westchester note to O'Donnell with instructions to discount the note and credit the proceeds to the account of Westchester Discount Corporation. This O'Donnell did (R. 50).

Westchester Discount Corporation paid $1,050.00 on account of this loan on January 20, 1931. No other amount was ever paid; no new note was given. On April 20, 1931, Cliff, at the solicitation of Ragan, delivered to Ragan an endorsement signed by Cliff as attorney-in-fact for the Surety Company purporting to extend the Westchester bond in the full amount to June 20, 1931. A second endorsement was given on June 20, 1931, purporting to extend the Westchester bond in the full amount to December 20, 1931 (R. 50, 98). No release was ever delivered to Cliff in connection with the execution and delivery of either of the aforesaid endorsements.

The second endorsement provided "in event of default on the part of the principal, said Westchester Discount Corporation of Mt. Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail of such default" (R. 98). Notice of default was given within five days of December 20, 1931, by registered mail to the Home Office of the Surety Company (R. 79).

The Stone Bond.

On June 2, 1931, Joseph Stone owed the Bank $51,700.00 upon existing notes, the proceeds of which were originally received by Stone. On that date Ragan told Cliff that the bank examiners were in the Bank; that he had told the examiners that Stone's loan, which with interest would exceed $52,000.00, was covered by a bond; and that, if Cliff would give another bond for $52,000.00 to be shown to the bank examiners, Ragan would be able to give him back the Stone bond as well as the Cronin and Westchester bonds (R. 50). As treasurer of Westchester Discount Corporation, Stone had signed the note and bond of that corporation above referred to (R. 97).

Cliff gave the bond on June 2, 1931. No power of attorney or copy was attached to this bond. A release dated June 4, 1931, was given to Cliff signed by Ragan, as president of the Bank, its terms being broad enough to release the Surety Company from all obligation (R. 50).

On June 4, 1931, Stone's indebtedness amounted to $52,222.75, and the several notes making up this indebtedness were renewed from time to time until the Bank closed, the amount of his indebtedness never sinking below $52,000.00 (R. 51).

The condition of the Stone bond, which was dated June 2, 1931, was "that if the said Joseph Stone shall, within one year from this date, make to the Boston Continental National Bank full and true payment of an obligation in the sum of Fifty-two Thousand Dollars ($52,000.00), then this obligation shall be void, otherwise shall remain in full force and effect." The bond further provided "in the event of default on the part of the principal, one year from this date, the obligee shall notify the Home Office of the said Surety Company at No. 80 John Street, New York City, New York, within ten days by registered mail of such default. . ." (R. 98, 99). No notice of default of the Stone bond was given to the Surety Company until on or about June 30, 1932, at which time a notice was given which com-

plied with the requirements of the bond except as to time (R. 80). Suit to cancel this bond was started by the Surety Company February 23, 1932, more than three months before it was due (R. 182).

The Robinson Bond.

On July 7 and 8, 1931, Ragan told Cliff that a loan was to be made to Gordon A. Robinson, doing business as Robinson Engineering Co., for $20,000.00; that the loan was for the benefit of Cronin, Robinson's brother-in-law; that it was unwise to make the loan in Cronin's name, but Cronin was to get the money. He told Cliff a bond was needed and that a release would be given as in the other cases. Cliff understood that this bond was to be used for the purpose of giving the appearance that the loan was secured by a surety bond and that it would be shown to the bank examiners. (R. 52.) Cliff gave the bond on July 8th, no power of attorney being attached. Later on the same day, and as part of the same transaction, Ragan delivered to Cliff a release in the same form as the previous release (R. 51, 52).

The Bank on July 8, 1931, after receiving this bond, discounted a note of Robinson's for $20,000.00, maturing November 9, 1931, put $4,593.33 of the proceeds under a certificate of deposit, which was additional security for the note, and credited Robinson's account with $15,406.67. Cronin got the amount thus credited. The loan was made for his benefit (R. 52).

On November 12, 1931, three days after the maturity of this note, $1,000.00 was paid to the Bank on account of this obligation and Robinson gave a new note for $19,000.00 maturing November 9, 1932. By application of the certificate of deposit and by other payments, the balance due on the Robinson account has been reduced to $14,403.52 (R. 52). On November 12, 1931, Oliver Ames, then a Vice-President of the Bank, dictated to Ragan's secretary, in his presence, a letter to the Surety Company stating that Robinson had

asked for a renewal of his note and requesting the company to confirm in writing their liability with respect to such renewal. (R. 129.)

Ragan intercepted this letter before it got into the mails, and at his request Cliff wrote to the Bank in his capacity as manager of the Boston Branch Office of the Surety Company, informing the Bank that Ames' letter had been sent to him by the Home Office for answer; that he handled all New England business, and that all questions should thereafter be referred to him; that the terms of the bond were explicit as to renewals; that there was no necessity for notice as to renewals and extensions; and that notice was required only within the stipulated period after the expiration of the bond itself. This letter was on stationery of the Surety Company (R. 129).

The Robinson Bond, dated July 8, 1931, provided "The condition of this obligation is such that if Gordon A. Robinson shall within four months from date hereof make to the Boston Continental National Bank full and true payment of note in the amount of Twenty Thousand Dollars ($20,000.), maturing November eighth, nineteen hundred and thirty-one, or of any extension thereof, in whole or in part, then this obligation shall be void, otherwise shall remain in full force and effect." (R. 99.)

The bond further provided "in the event of default on the part of the principal, the obligee shall notify the Home Office of such Surety at No. 80 John Street, New York City, New York, within ten (10) days, by registered mail, of such default and the Surety Company shall, within thirty (30) days, pay any liability hereunder, not exceeding the amount still unpaid on the aforesaid note, or any extension or renewal thereof at time of default, four months from date hereof and in no event exceeding Twenty Thousand Dollars ($20,000.00); the liability of the Surety Company with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two." (R. 100.)

On July 10, 1932, the Bank gave notice to the Surety Company which in form complied with the requirements of the Robinson bond (R. 81).

Receiver's Action Against Fidelity & Deposit Company of Maryland.

By writ dated December 21, 1932, the original receiver brought suit against Fidelity & Deposit Company of Maryland on certain so-called "bankers' blanket-fidelity bonds", issued by that company insuring the Bank against loss by the fraud of its officers. In that suit, the receiver submitted claims aggregating $501,385.24, arising from losses sustained by the Bank, alleged to have resulted from the fraudulent conduct of Ragan. Among the several items of loss listed by the Receiver in his claim against Fidelity & Deposit Company were the losses sustained with respect to the several promissory notes which the note-guaranty bonds here in question purported to secure, which the Receiver had then ascertained were probably uncollectible. The Receiver filed with the Fidelity & Deposit Company his notice of loss under the Fidelity bonds above referred to, under date of April 28, 1932, and supplemented this by a formal proof of loss on June 2, 1932. But, on February 23, 1932 (prior to the filing of the notice of loss and proof of loss above referred to), the Surety Company had brought in the Superior Court for the Commonwealth of Massachusetts the four bills in equity, seeking the cancellation of the bonds which are now before this court (R. 81-87).

On October 10, 1934, the Receiver's suit against the Fidelity & Deposit Company was settled by compromise by the payment to the Receiver of $100,000.00. The compromise and settlement was carried out pursuant to an agreement between the parties, whereby the Receiver expressly reserved all rights against the Standard Surety & Casualty Company with respect to the four bonds, and the endorsements thereto which are the subject of the instant cases.

The Surety Company was a re-insurer on the fidelity bonds issued by the Fidelity & Deposit Company, and the Receiver was aware of this fact at the time the compromise with the Fidelity & Deposit Company was effected (R. 87, 88).

Subject—Index to Master's Report.

The Bank, its President and its Receiver (R. 44).
The Cronin transaction (R. 44-49).
The Westchester transaction (R. 49, 50).
The Stone transaction (R. 50-51).
The Robinson transaction (R. 51, 52).
Reliance upon the bonds by creditors of the Bank. (R. 54-59.)
Notice of Default (a) of Cronin bond (R. 76-78).
(b) of Westchester bond (R. 78-79).
(c) of Stone bond (R. 79, 80).
(d) of Robinson bond (R. 80, 81).
Election of remedy (R. 81-88).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the First Circuit erred in ruling:

(1) That all defenses available against a national bank are available against its receiver after the bank has become insolvent, on the theory that such receiver stands no better than the bank itself.

(2) That since Ragan (the Bank's president) knew that Cliff (the Surety Company's agent) was acting in fraud of his principal and violating the latter's instructions in executing the bonds, such knowledge on Ragan's part is to be imputed to the Bank with the result that the Receiver cannot recover on the bonds.

(3) That inasmuch as the Bank itself could not have enforced the contracts of the Surety Company set forth in

the bonds, the Receiver cannot enforce such contracts or recover thereon, even though:

(a) Cliff's written and publicly disclosed power of attorney included authority to write bonds of this type and contained a ratification of all that Cliff might do within the scope of the power;

(b) Cliff gave the bonds with the intent that they should appear to be valid and enforceable obligations of the Surety Company in favor of the bank;

(c) Cliff intended that the bonds should be shown to the Bank Examiners and relied upon by them as valid obligations of his principal;

(d) Cliff furnished with two of the bonds authenticated multi-originals of his power of attorney, with the intent that they should be exhibited to the Bank Examiners as proof of his authority to execute the bonds;

(e) The Surety Company had furnished Cliff with these multi-original powers of attorney for the purpose of having them shown or delivered to third parties dealing with Cliff as proof of his unlimited authority;

(f) the Bank Examiners saw and relied upon the bonds and the power of attorney;

(g) the Bank Examiners failed to seasonably discover the unsound and eventually insolvent condition of the Bank because of such reliance; and

(h) the Bank's depositors and other creditors suffered loss because of such reliance.

SUMMARY OF ARGUMENT.

The Receiver's position rests primarily upon the proposition that the circumstances surrounding the giving of the note-guaranty bonds by Cliff to the Bank accompanied by the supporting powers of attorney, duly certified and authenticated by the Surety Company through its proper executive officers (which instruments had been furnished him

by the Surety Company with the intent on the part of its directors and executive officers that they be used for the exact purpose for which Cliff used them in the instant cases), and the consequences which followed the credence given to said bonds and powers of attorney by the national bank examiners and the Comptroller, acting as the representatives of the depositors and other creditors, give rise, in a suit by the Receiver to enforce the bonds, to an *estoppel* which precludes the Surety Company from denying the validity of the bonds and from asserting as a defense that its agent acted fraudulently and without authority in executing the bonds and that a fraudulent official of the Bank knew of the agent's misconduct.

The basic conception upon which rests the Receiver's position has been recognized and applied in decisions of this court holding in effect that a receiver of an insolvent corporation and particularly of an insolvent national bank may have rights which rise higher than those of the corporation itself as a going concern, or may not be subject to defenses which would have been effective against the corporation. This court has never rendered any decision which expressly decides that the doctrine of estoppel here invoked by the Receiver is not applicable to a set of facts such as are revealed in the instant cases. The decision in *Rankin, Receiver* v. *City National Bank,* 208 U. S. 541, principally relied upon by both courts below, does not hold that such an estoppel does not arise. Several of the lower federal courts, as well as the highest courts of a majority of the several states, have recognized this doctrine of estoppel as applicable to facts and circumstances such as exist in the cases at bar.

The instant cases do not fall within the class of cases wherein is applied the rule of law which holds that when two equally innocent parties are victims of the fraud of their respective agents the law will not intervene to relieve the one of the burden of the loss and shift it to the other, but will let the loss remain where it lies when the fraud is

discovered. That rule is not applicable to the instant cases because here the real question is whether the eventual loss should fall upon the proprietors (stockholders) of the solvent Surety Company who, through their properly appointed officers, armed Cliff with indisputable indicia of authority to execute the bonds sued on, or whether the loss should fall upon the innocent depositors and other creditors of the insolvent bank who were in no way responsible for the duplicity of either Cliff or Ragan. In other words, in these cases there are (or might have been) three groups of parties concerned, namely:

(1) the stockholders of the Surety Company, who will be the eventual sufferers if the loss is imposed upon their corporation;

(2) the stockholders of the Bank, who would be the sufferers if the Bank were solvent; and

(3) the depositors and creditors of the Bank, who will in fact be the sufferers if the Surety Company is permitted to escape liability, since the Bank is insolvent and cannot pay its creditors in full even with the funds available from stock assessments.

If the Bank were solvent it might well be that the rule above referred to would properly be applied and the loss allowed to rest with the Bank. Such a ruling would recognize the fact that both groups of stockholders had been unfortunate in the selection of their agents, although equally innocent of wrong doing. But the Bank's stockholders are no longer concerned. The question is whether the loss shall fall upon the stockholders of the solvent Surety Company or on the innocent depositors and creditors of the insolvent bank.

In the case of a national bank, its depositors and creditors constitute a separate group of parties in interest and are recognized as such by the national banking laws. The Comptroller of the Currency, who is selected not by the stockholders of the bank but by the Government (because

of the public character of national banks and their functions and activities) represents the depositors and creditors and has the duty to protect their interests. So long as a national bank is a going concern the Comptroller performs his functions of representation and protection of the depositor-creditor group through the bank examiners. When the bank has ceased to be a going concern these functions are performed through a receiver. When a person extends credit to a national bank by a deposit of money therein or otherwise he adopts the representation of the Comptroller of the Currency for the protection of his interests. He has no other means of protection. Therefore, when in circumstances such as appear in the instant cases the equities as between the Surety Company's stockholders are weighed against those of the depositor-creditor group, it is found that they are not equal. The depositors and creditors were wholly innocent, both personally and through their legally appointed representatives, of any knowledge of or participation in any wrong doing. On the other hand, the stockholders of the Surety Company have, by the method of business adopted by their responsible representatives, invited the representatives of the depositor-creditor group (namely, the bank examiners and the Comptroller of the Currency) to place reliance upon the promises and representations of the Surety Company's agent with consequent loss to depositors and creditors of the bank.

To say that the rights of a national bank as a corporate entity are identical with those of its receiver is to ignore the realities implicit in the scheme of the national banking system, which recognizes that the interests of the depositor-creditor group are of especial concern to the Government and require the protection of the Government. Such a receiver may derive certain rights in behalf of the creditors through the creditors rather than through the bank itself and may likewise, on grounds of estoppel springing from considerations of public policy, strike down certain defenses which might have been interposed against the bank itself.

For these reasons the Receiver in the instant cases is entitled to relief, even assuming that the Bank as such would not be entitled thereto. To hold otherwise would tend to defeat the purposes of the regulatory statutes governing national banks and would conflict with sound public policy, inasmuch as such a ruling would permit persons in connivance with a fraudulent bank official to loot the bank by placing spurious notes and other obligations among its assets, with the intent that the bank examiners should regard the same as genuine, and then to escape liability by pleading the making of an agreement by the faithless bank official to the effect that the obligations would never be enforced by the bank.

The intimation appearing in the opinions of the Circuit Court of Appeals for the First Circuit that the Receiver in the instant cases might have been entitled to relief had he adopted a different form of pleading, is not founded on a sound conception of the principles of law involved in the instant cases. The only alternative to an action sounding in contract to enforce the promises contained in the bonds would be an action of tort for deceit. But no deceit will have been successfully practiced on the Bank's depositors and creditors if the Surety Company is held to be estopped to deny both the validity of its written obligations executed by Cliff and the binding force of the unlimited power of attorney which it gave to Cliff for just the use to which Cliff put it and its solemn ratification expressed in the power of attorney of all that Cliff might do pursuant to the power.

The Surety Company's secondary defenses based upon (1) the alleged deficiencies surrounding the Receiver's notices of default given to the Surety Company, (2) the alleged variance between the note of Westchester Discount Corporation held by the bank and the description thereof set forth in the bond given by the Surety Company to secure the same, and (3) the alleged election of remedy made by the Receiver with respect to certain fidelity or theft indemnity bonds held by the Bank, are all without substance or merit.

ARGUMENT.

I.

The Receiver of an Insolvent National Bank is Not, in All Cases, Subject to Defenses Which Could Have Been Successfully Interposed in a Suit by the Banking Corporation Itself as a Solvent Going Concern.

The basis of the decisions of the United States District Court and the Circuit Court of Appeals, except that portion of the decisions of the Circuit Court of Appeals relating to the pleading question which will be dealt with hereafter, is that the petitioners are not entitled to relief because if the Bank as a going concern had instituted suit upon the bonds here in question it could not have recovered and the Receiver stands no better than the Bank itself.

The petitioners do not admit that the Bank could not have recovered if it had instituted an appropriate action on the bonds here in question prior to insolvency because there is considerable doubt as to whether the knowledge of a defaulting bank officer can be imputed to the bank under circumstances such as those involved in these cases. It must be borne in mind that throughout the transactions here in question Ragan acted solely in his own interest or in the interest of his confederates and never in the interest of the Bank. Whatever Ragan did or knew in the premises he did or knew in connection with the perpetration of a fraud upon his own principal, the Bank, and the knowledge which he had as to Cliff's breach of faith was inextricably intertwined with his own fraudulent acts. On such a state of facts an exception to the rule, that the knowledge of an agent is to be imputed to his principal, is applicable. This exception to the rule is clearly set forth in *American National Bank* v. *Miller*, 229 U. S. 517, 522, 57 L. Ed. 1310, (1913). The exception is based upon the proposition that where it is to the interest of an agent to conceal information from his principal it will not be presumed that he disclosed the information to his principal. This exception to

the rule was adopted and applied by the Supreme Judicial Court of Massachusetts in the case of *Innerarity* v. *Merchants National Bank,* 139 Mass. 332, 333, 1 N. E. 282 (1885), wherein the court stated:

> "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would, necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

See also *Allen* v. *South Boston Railroad,* 150 Mass. 200, 22 N. E. 917, (1889); *Broadway National Bank* v. *Heffernan,* 220 Mass. 247, 107 N. E. 921, (1915); *Indian Head National Bank* v. *Clark,* 166 Mass. 27, 43 N. E. 912, (1896).

To say that Ragan's knowledge of Cliff's breach of faith with his principal, the Surety Company, is to be imputed to Ragan's corporate principal, the Bank, is merely to state the abstraction or fiction which the common law created in its effort to do justice between two parties, one or both of whom have dealt through an agent. But the doctrine of imputation of knowledge, being based upon a legal fiction, should not be invoked except where necessary to attain the ends of justice. In the instant case the axis of imputation might perhaps extend to the Bank represented by Ragan and be projected on to the banks' proprietors, its stockholders, should the ends of justice demand that they stand the loss, as would be the case if the bank were solvent or could pay its depositors and creditors in full from its assets enhanced by the stock assessments. But since the present cases involve a public banking institution which has become insolvent and whose stockholders have suffered to the full extent provided by the law and their contribution by way of assessment (together with the proceeds of all the

assets of the bank) are insufficient to pay the depositors and creditors in full (R. 60), the axis of the imputation of Ragan's knowledge should not be forked or distorted to strike the bank examiners and the Comptroller, and through them the depositors and other creditors who were in no way responsible for Ragan's appointment to the position which enabled him to connive with Cliff for the purpose of despoiling the depositors and creditors. The fiction of imputation of knowledge is an incident to the law of agency but Ragan was not either directly or indirectly the agent of the public officers charged with the duty of protecting the interests of the depositors and creditors.

However, we are not here interested directly with the question of whether the Bank as a going concern could have recovered upon the bonds here in suit. As in the recent decision of this Court in *McCandless* v. *Furlaud,* 296 U. S. 140, 80 L. Ed. 121, (1935), it is immaterial in these cases whether the corporation could have recovered and therefore our argument will deal directly with the question of whether the Receiver as the representative of the depositors and creditors is entitled to recover upon the note-guaranty bonds.

The only necessity for even discussing the right of the Bank as such to recover in the instant cases is the fact that both courts below construed decisions of this court as establishing a general rule to the effect that a receiver of an insolvent national bank stands no better than the bank itself. We deny that proposition. It is true that in several decisions of this court, there is found by way of dicta, statements that the receiver of an insolvent national bank stands no better than the bank itself. In *Rankin* v. *City National Bank,* 208 U. S. 541, 52 L. Ed. 610, (1908), which case will be discussed at length hereinafter the following statement is found at page 546:

> "...if the Guthrie bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

In the case of *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, (1892), wherein the court was dealing only with the right of set-off with respect to debts and credits in settling a claim of a depositor of a closed bank, the following language is found at page 507:

> "The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

In the case of *Fourth Street National Bank* v. *Yardley*, 165 U. S. 634; 41 L. Ed. 855, (1897), it was held that where an equitable lien upon certain assets of an insolvent national bank existed prior to the closing of the bank the receiver took the assets subject to the lien.

It is submitted that in none of the three aforementioned cases did this court attempt to lay down a general rule of law applicable to receivers of national banks covering all circumstances.

This court has recognized that under certain circumstances a receiver of an insolvent national bank is not subject to defenses which would have been available in a suit by the bank itself as a solvent going concern. In the case of *Texas and Pacific Railway Co.* v. *Pottorff, Receiver*, 291 U. S. 245, 78 L. Ed. 777 (1934), it was held that a depositor could not enforce against a receiver of a national bank a contract under which the bank had agreed to segregate certain of its securities and hold the same as collateral to secure the repayment of the customer's deposits. In that case, the receiver was held not to be bound by the agreement as to security and the depositor was left in the position of an unsecured creditor of the bank. This court, speaking through Mr. Justice Brandeis, stated at page 260-261:

"But even if the bank could have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.

"• • • The receiver may assert the invalidity of the pledge without making restitution by paying the pledgees' claim in full."

See also *City of Marion* v. *Sneeden,* Receiver, 291 U. S. 262, 78 L. Ed. 787 (1934).

This court has twice held that a stockholder of a defunct national bank is liable for the payment of a stock assessment, even though his shares were purchased from the bank itself in reliance upon grossly fraudulent misrepresentations as to the condition of the bank made by officers of the bank for the purpose of inducing the stockholder to purchase the shares. See *Scott* v. *Deweese, Receiver,* 181 U. S. 202; 213; 45 L. Ed. 822 (1901); *Lantry* v. *Wallace, Receiver,* 182 U. S. 536, 550, 551, 45 L. Ed. 1218 (1901). In each of those cases, the bank itself was the vendor of the stock and the fraudulent misrepresentations were made by officers of the bank who had been duly authorized to sell the shares in question. As a result of the decisions in those two cases the receivers were held entitled to enforce, *for the benefit of the banks' creditors,* obligations which were imposed upon those stockholders as a result of the fraudulent acts of the banks' own officers. In the case of *Oppenheimer* v. *Harriman National Bank and Trust Company,* 301 U. S. 206, 81 L. Ed. 1042, (1937), it was held that where one was induced to purchase stock of a national bank by misrepresentations made by an officer of the bank, he may have the right to rescind the contract of purchase, either before or after the bank becomes insolvent and a receiver is appointed, but that such rescission, if after insolvency,

would not relieve the purchaser of the stock from liability for the stock assessment levied for the benefit of the creditors of the bank and collectible by the receiver on their behalf.

Thus, it appears that the policy of the national banking law requires that even if a stockholder has been the victim of a fraud perpetrated by a bank official, the fact of the fraud does not avail him when upon insolvency the bank's receiver seeks to enforce against him the very obligation which he was induced to assume by virtue of the fraud. He must first perform that obligation for the benefit of the depositors and creditors and pay the monies due on stock assessments arising from the ownership of record of the stock and then, but then only, may he be heard to assert his rights as a creditor of the bank to the extent of the initial loss which he suffered because of the fraud. In essence, the rights of the depositors and creditors (represented by the receiver) are deemed to be paramount and equities in favor of the defrauded party which would have prevailed had the bank itself and its proprietor stockholders been the parties in interest must give way to the superior equities in favor of the receiver.

It is submitted that these cases recognize and rest upon the principle that the receiver of an insolvent national bank is not in all cases subject to defenses which could have been successfully interposed in a suit by the banking corporation itself as a solvent going concern, and that the rights of the receiver will be recognized as being superior to those of third parties who have dealt with the bank and its officials, whenever public policy, invoked in aid of the protection of the national banking system, demands that the interest of the depositors and other creditors be regarded as paramount.

This court has recently held in the case of *McCandless* v. *Furlaud, et al.* 296 U. S. 140, 160, 80 L. Ed. 121 (1935) that the receiver of a private corporation (as distinguished from a national banking association) may recover illicit

profits from fraudulent promoters and that in so recovering the receiver acts as the representative of the creditors of the corporation and for their benefit. The decision in that case appears to be an express recognition of the legal principle that where the ends of justice so require, a receiver acting as the representative of the creditors and for their benefit may enforce rights which the corporation itself could not have enforced.

II.

The Surety Company is Estopped to Deny the Validity of the Note-Guaranty Bonds as Against the Receiver of the Insolvent National Bank in His Capacity as a Representative of the Depositors and Creditors Thereof.

In the lower courts the Surety Company included in its defenses the contention that its agent, Cliff, was not authorized to execute the particular note-guaranty bonds here in question and that in any event the Bank was bound by certain releases executed by Ragan who purported to act on behalf of the Bank. Irrespective of the question as to whether such defenses would have been available against the Bank as a going solvent institution, it is the contention of the Receiver that the Surety Company is estopped from asserting said defenses as against the receiver of an insolvent national bank acting on behalf of the depositors and other creditors, for the reasons which will be discussed in the following subsections:

A.

National banks are creatures of the Federal Government and their business is vested with a public interest.

The services rendered by national banks and other public banking institutions and the part they play in the economy of the nation place them in a special category entirely different from that of ordinary private business corporations. Therefore, rules of law which accomplish a desirable and

equitable result when applied to ordinary business corporations or individuals may accomplish a very injurious and undesirable result if applied to national banks and other public institutions.

This court has held that the establishment of a national banking system is a proper exercise of a governmental function under the constitution. *McCulloch* v. *State of Maryland* (1819) 17 U. S. 316, 4 L. Ed. 579; *Osborn* v. *The Bank of the United States,* (1824) 22 U. S. 738, 6 L. Ed. 204. See also *Farmers and Mechanics National Bank* v. *Dearing,* (1875) 91 U. S. 29, 23 L. Ed. 196; *Cook County National Bank v. U. S.* (1883) 107 U. S. 485, 27 L. Ed. 337; *Easton* v. *Iowa* (1903) 188 U. S. 220, 47 L. Ed. 452.

Congress having the power to create a system of national banks has the sole power to regulate and control their operations. *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 40 L. Ed. 700; *Easton* v. *Iowa, supra.* In the exercise of that power the Congres has established the office of the Comptroller of the Currency (12 U. S. C. 1, see Appendix p. 92). The duties of the Comptroller include the chartering of all national banks (12 U. S. C. 27, see Appendix p. 92), and regulating the business of those banks as prescribed by the statute.

The statute provides for the maintaining of a staff of experts to make periodic examinations of all national banks (12 U. S. C. 9, see Appendix 92). The status and functioning of a national bank examiner was described in the case of *Witters* v. *Sowles,* 32 Fed. 762 (C. C. A. Vt.) (1887) at page 764, as follows:

> "He represented a department of the Government which supervises and controls the banks as to whether in certain cases they shall do business at all or not, but it does none for them, other than to wind up their affairs for their creditors. The Examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business."

All national banks are expressly subject to examination by the examiners appointed by the Comptroller (12 U. S. C. 481, see Appendix p. 95), and the banks must submit regular reports to the Comptroller disclosing their condition (12 U. S. C. 161, see Appendix p. 94).

In addition, the Congress has imposed a duty upon the Comptroller to report to it any suggestions he may have by which the system may be improved and by which the "*security of the holders of its notes and other creditors may be increased.*" (12 U. S. C. 14, see Appendix p. 92). The quoted phrase indicates a disposition on the part of the Congress to regard the depositors and other creditors of a national bank as a special group or class whose protection is of vital concern to the Government.

If the Comptroller concludes from the reports of his examiners that there has been an impairment of the capital structure of any national bank he may require the directors and stockholders of the bank to remedy the impairment (12 U. S. C. 55, see Appendix p. 93), and in the event that stockholders and directors fail to comply with the requirement he may appoint a receiver for the protection of the depositors and creditors of the bank, whose duty it is to liquidate the bank and make a ratable distribution of the proceeds of the assets to depositors and other creditors (12 U. S. C. 191, 194, see Appendix pp. 94, 95) *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782 (1897); *U. S.* v. *Weitzel*, 246 U. S. 533, 62 L. Ed. 872 (1918); *Hulse* v. *Argetsinger*, 18 F. (2d) 944; at 945 (C. C. A. 2nd) (1927); *Lehman* v. *Spurway*, 58 F. (2d) 227 at 228 (C. C. A. 5) (1932); *In Re Battani, et al.* 6 F. Supp. 376 at 379 (D. C. Mich.) (1934).

The position of the Receiver as the instrument of the Comptroller of the Currency and the representative both of the Bank and the creditors has been recognized by this court in the case of *Kennedy, Receiver* v. *Gibson, et al* 75 U. S. 498, 19 L. Ed. 476 (1869). It was specifically stated in that case that when the receiver of an insolvent national bank sues in his own name it is not necessary for him to

make either the creditors or the association a party to the suit, for he represents both.

That the primary function of the receiver, as in the case of the examiners and the Comptroller, is the protection of the creditors was recognized by this court in *United States* v. *Weitzel,* 246 U. S. 533, 541-542, 62 L. Ed. 872 (1918), wherein it was held that a receiver is an officer of the United States appointed by the Comptroller of the Currency when the condition of a national bank or its practices make intervention by the government necessary for the protection of its creditors.

To perform his functions of supervision, representation and protection, the Comptroller is given broad powers as was recognized in the cases of *Bushnell* v. *Leland,* 164 U. S. 684, 685, 41 L. Ed. 598, (1897), *Easton* v. *Iowa,* 188 U. S. 220, 238, 47 L. Ed. 452 (1903) and *Thomas* v. *Taylor,* 224 U. S. 73, 82, 56 L. Ed. 673 (1912).

The foundation of the national banking system is public confidence and to be effective in the performance of its public functions it must invite and receive the deposits of the people. Therefore, when the Comptroller of the Currency permits a national bank to remain open he invites members of the public to deposit their funds with the bank, to leave funds on deposit and to otherwise conduct business with the bank. The mere fact that a national bank is open is a continuing invitation to the public to rely on its soundness and an assurance that the Comptroller and his examiners deem the bank sound and honestly administered. The depositors have no rights respecting the operation or management of a national bank and have no means of knowing the soundness of the bank except by reliance upon the statements publicly issued from time to time by the bank as prescribed by the Comptroller of the Currency and upon other actions taken by the Comptroller for their protection. The stockholders of the bank, as its proprietors, have the usual rights and privileges, with respect to the inspection of the books and records of the banks, which are accorded to

stockholders of private corporations. *Guthrie* v. *Harkness*, 199 U. S. 148, 50 L. Ed. 130 (1905). But depositors and other creditors, though vitally interested in the safety of the institution, have no such rights. All such protective activities are denied to the depositors and creditors and lodged by law in the hands of the Comptroller. See *Rasmussen* v. *Hamilton*, 71 F. (2d) 212 (Ct. of App. D. C.) (1934). It seems clear that unless matters relied on by the examiners and through them by the Comptroller are *ipso facto* relied on by the depositors and other creditors who cannot act for themselves the purpose of the protective provisions of the National Bank Act would be largely defeated.

Thus the law creating, regulating and protecting the national banking system recognizes the fact that there are three separate groups or entities concerned in the business of public banking, namely, the banking corporations, their stockholders, and depositors, and other creditors as represented by the government through the Comptroller of the Currency, his examiners and receivers. This thought was well expressed in the case of *United States National Bank of La Grande* v. *Pole*, 2 F. Supp. 153, (D. C. Ore.) (1932), where the court commented that the statutory provisions for the ultimate protection of the depositors are founded in a sound public policy and stated at page 157:

> "The charter contract is tripartite, including the corporation, the stockholders, and the sovereign in the interest of the depositors. All the laws relating to the national banking associations are inherently a part and parcel of this contract."

B.

National bank examiners and the Comptroller of the Currency, in the performance of their duty to protect the depositors and creditors of the bank, relied upon the validity of the note-guaranty bonds.

The report of the Master included findings of fact to the effect that subsequent to the giving of the Cronin bond three bank examinations were made by the national bank examiners acting under the Comptroller of the Currency. The first examination was on October 6 and 7, 1930. The Cronin bond was examined, and the examiner concluded that the Cronin loan was not slow, doubtful, or a loss (these being the three classifications for undesirable paper), and so reported. (R. 54.) The second examination was conducted February 22 to March 3, 1931. The Cronin and Westchester bonds were examined, and the examiner concluded that these two loans were not slow, doubtful, or a loss, and so reported. (R. 54.) The third examination was conducted between August 20 and September 5, 1931. All four bonds were examined and the loans were not criticized in the report, with the exception of the Stone loan which was classified as "slow" because it appeared that the bank might not be paid until the bond expired. (R. 54.) In the course of this latter examination the examiner talked with Cliff and was assured that the bonds were all right. He also checked the authority of the Surety Company to do business in Massachusetts and Cliff's qualification as an agent and found both satisfactory (R. 55).

Certainly there was no negligence on the part of the examiners in arriving at their conclusions respecting the validity of these bonds. They made every reasonable check of the authority of Cliff to execute the bonds. In fact, there was no negligence on the part of the directors of the Bank, and the Master so found. (R. 53.) The directors inquired about the bonds, examined some of them, and approved of the loans in reliance thereon. On one occasion, in connec-

tion with the renewal of the Robinson loan, a letter was written by the Vice-President of the Bank to the home office of the Surety Company, but, through the connivance of Ragan, that letter was diverted to Cliff who replied on stationery of the Surety Company informing the Bank that since he was the manager of the Boston branch office of the Surety Company the letter had been sent to him by the home office for answer and that inasmuch as he handled all New England business of the Surety Company all questions should thereafter be referred to him. (R. 129.)

On three occasions, namely, April 3, 1931, July 10, 1931, and October 14, 1931, the cashier of the Bank published in the Boston Transcript a statement of condition of the Bank given pursuant to a "call" from the Comptroller of the Currency (R. 58.) Publication of the statement given in response to the call is required by law (12 U. S. C. 161, see Appendix p. 94). Each statement contained a single figure showing the total amount of "loans and discounts". In each of these totals the amounts of such of the Cronin, Westchester, Stone, and Robinson notes as were at the time outstanding were carried at face value. The Comptroller of the Currency, through the aforementioned examinations by the national bank examiner and the reports based thereon as well as the "call" reports, relied upon the validity of the note guaranty bonds securing the assets in question, and the Master so found as a matter of fact. (R. 58.)

As stated by the Master, the knowledge on the part of the Comptroller and his examiners of the existence of the uncollectibility of some $120,000.00 of its loans (over 10 per cent of its capital) would have been the occasion for whatever vigorous action for the protection of old depositors and the prevention of loss to potential new depositors the Comptroller could take. The Master found that the failure of the Comptroller of the Currency, who was thus deceived and thus precluded from exercising his legal and practical authority, to require the actual infirmities in the loans here in question to be corrected was in reliance on

the supposed validity of the bonds now in suit (R. 59). There were, of course, hundreds of thousands of dollars deposited in the Bank subsequent to the giving of the first bond and subsequent to the first examination after that bond was given, namely, October 6 and 7, 1930 (R. 54). Furthermore, it is obvious that all creditors who permitted their funds to remain on deposit in the Bank did so in the belief that the Bank was a sound and solvent institution and this belief was engendered by the fact that the Comptroller of the Currency permitted the Bank to continue operating as a going concern. The continued operation of the Bank was, in itself, an invitation to the public generally to deal with the Bank as a solvent concern. All of such depositors and creditors suffered a very substantial loss due to such reliance, as evidenced by the findings of the Master. As of December 31, 1934, the Bank owed over $3,000,000.00 to general creditors and depositors, whereas the fair value of its assets available for paying these creditors was $170,000.00. (R. 60.)

There were findings of fact by the Master to the effect that one creditor relied specifically on an examination of the assets of the bank, including the aforementioned loans, made by his own personal representative in connection with a transaction in which he subsequently became involved with the Bank. This particular reliance, however, only adds to and does not detract from the general reliance of the depositors and creditors as a group upon the validity of these note-guaranty bonds, derived through the direct reliance of the examiners and the Comptroller of the Currency upon such validity. In other words, as stated by the Master, documents upon which the examiners directly rely are *ipso facto* indirectly relied upon by the depositing public. (R. 60.)

C.

Where such reliance and loss on the part of creditors of an insolvent bank are shown, the depositors and creditors, through the medium of the receiver, can, by the vast weight of authority, invoke the doctrine of estoppel to defeat defenses such as herein asserted by the Surety Company.

Although the instant cases relate to the rights of depositors and creditors of an insolvent national bank acting through a receiver, it is pertinent to examine the decisions of both State and Federal courts in similar cases involving insolvent state banks as well as insolvent national banks because all States have banking systems in general similar in control and organization to the national banking system. For this reason, we have included in the following discussion decisions relating to state banks as well as national banks.

1. Federal Court decisions sustaining Receiver's position.

The earliest Federal case sustaining the Receiver's position is *Pauly* v. *O'Brien,* 69 Fed. 460 (C. C. Calif.) (1895). In that case it was held that the receiver of an insolvent national bank could recover on a promissory note which the maker had given to the bank in order to enable the bank to remove from its assets a note which was considered practically worthless. The court said, at p. 461:

> "It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act."

The doctrine contended for by the Receiver has been upheld in the Fourth Circuit in the case of *Federal Reserve Bank* v. *Crothers,* 289 Fed. 777 (C. C. A. 4) (1923). In that case the defendant executed a note to the national bank

there involved at the solicitation of one Warburton, its president, who told the defendant that the note was to be used to take the place of an equivalent principal amount of bonds of an electric light company, held by the bank, to which the bank examiners had objected. Warburton actually used the note in substitution for the note of a third party which had been previously obtained by Warburton and used for the purpose of removing said excessive bond holdings. Crothers received no consideration for the note and there was no evidence that the bank parted with anything in exchange for the note. The Circuit Court of Appeals for the Fourth Circuit ruled that the District Court should have instructed the jury to find for the plaintiff (the receiver of the bank). Mr. Circuit Justice Taft (then Chief Justice of this Honorable Court) sat on the case in the Circuit Court of Appeals as Circuit Justice and concurred in the opinion. The court said, at p. 779:

> "Public policy requires that the maker be *estopped* from denying his liability under such circumstances." (Italics ours.)

A similar view of the law was taken by the Circuit Court of Appeals for the Fifth Circuit in the case of *Bohning v. Caldwell*, 10 F. (2d) 298 (C. C. A. 5) (1925), cert. den. 271 U. S. 663, 70 L. Ed. 1139. In this case the action was by the receiver of a national bank for the purpose of recovering the amount of a note executed by five directors of the bank for the purpose of taking up notes owned by the bank but considered worthless. Certain of the defendants set up the defense of no consideration and contended that it was not contemplated that the directors would ever have to pay the amount of the note. The court, in holding the defendants liable, said, at p. 299:

> "Furthermore, the funds derived from the discount of the note increased the assets of the bank in which they (the makers) were interested. The note imports consideration, and they are *estopped* to deny it. The

weight of authority supports this conclusion." (Italics and insert ours.)

This decision is of particular significance inasmuch as in the course of the opinion the court referred to the case of *Pauly* v. *O'Brien, supra,* as stating the sound doctrine, after having considered and referred to the line of cases typified by the case of *Peterson* v. *Tillinghast,* 192 Fed. 287 (C. C. A. 6) (1911), which was cited with approval in the court below in the instant cases as appearing to hold the contrary view.

Also, see *Utley* v. *Clarke, et al.,* 16 Fed. Supp. 435, (D. C. New York) (1936), where the court adopted the view of the law here contended for by the Receiver. In that case the plaintiff sought to recover from the receiver of an insolvent national bank certain securities, or the value thereof, which he had placed in the custody of the bank's officers for the purpose of giving them the appearance of assets of the bank. The court expressed itself as follows, on page 439:

> "While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is *estopped* from asserting his claim as against depositors and other creditors." (Italics ours.)

The decision recognizes that the real parties in interest are the depositors and creditors, although the receiver is the party to the suit in their interests.

2. State Court decisions sustaining Receiver's position.

The contention of the Receiver is sustained by decisions of the highest courts of a majority of the States as is disclosed by the following:

ALABAMA:

See *Day* v. *Farmers' & Merchants' Bank,* 229 Ala. 372, 376-377, 157 So. 439, 443-444 (1934).

COLORADO:

Murphy, Receiver v. Gumaer, 18 Colo. App. 183, 70 Pac. 800, 802-803 (1902).

Rogers v. *First State Bank,* 79 Colo. 84, 243 P. 637 (1926).

FLORIDA:

Ashley v. *Rowe,* 101 Fla. 110, 133 So. 551, 552 (1931).

ILLINOIS:

Golden v. *Cervenka,* 278 Ill. 409, 116 N. E. 273, 282, 283, (1917);

Niblack v. *Farley,* 286 Ill. 536, 122 N. E. 160 (1919);

Boller v. *Field,* 260 Ill. App. 488, 492 (1931);

Nelson v. *Colegrove,* 265 Ill. App. 488 (1932).

INDIANA:

Iglehart v. *Todd,* 203 Ind. 427, 178 N. E. 685, (1931).

KANSAS:

German-American State Bank v. *Watson,* 99 Kan. 686, 163 Pac. 637 (1917);

Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995, 997 (1924);

Hayes v. *Addy,* 139 Kan. 481, 32 Pac. (2d) 243, (1934);

Bell v. *Johnson,* 142 Kan. 360, 46 Pac. (2d) 886, (1935).

KENTUCKY:

Denny v. *Fishter,* 238 Ky. 127, 36 S. W. (2d) 864 (1931).

MARYLAND:

See New v. *Page,* 144 Md. 606, 125 Atl. 403, 404 (1924).

MASSACHUSETTS:

Prudential Trust Co. v. Moore, 245 Mass. 311, 139 N. E. 645, 647 (1923).

MINNESOTA:

Skordal v. *Stanton,* 89 Minn. 511, 95 N. W. 449 (1903);

German-American Finance Corp. v. Merchants & Mfrs. Bank, 177 Minn. 529, 225 N. W. 891, 893 (1929).

MISSOURI:

Third National Bank of St. Louis v. *Reichert*, 101 Mo. App. 242, 73 S. W. 893, 896 (1903);

Bank of Slater v. *Union Station Bank*, 283 Mo. 308 at p. 320, 222 S. W. 993 (1920).

MONTANA:

State Bank of Moore v. *Forsyth*, 41 Mont. 249, 108 Pac. 914, 919 (1910).

NEBRASKA:

Harrington v. *Connor*, 51 Neb. 214, 70 N. W. 911 (1912).

NEW JERSEY:

See *Schmid* v. *Haines*, 115 N. J. L. 271, 274, 178 Atl. 801, 803 (1925).

NEW YORK:

Hurd v. Kelley, 78 N. Y. 588 (1879);

Best v. Thiel, 79 N. Y. 15 (1879);

Sickles v. *Herold*, 32 N. Y. S. 1083 (1895);

Bay Parkway Nat. Bank v. Shalom, 270 N. Y. 172, 200 N. E. 685, 687 (1936);

Mount Vernon Trust Co. v. *Bergoff*, 272 N. Y. 192, 5 N. E. (2d) 196, (1936).

NORTH DAKOTA:

Vallely v. *Devaney*, 49 N. Dak. 1107, 194 N. W. 903, (1923);

Peterson v. *Baird*, 63 N. Dak. 604, 249 N. W. 690 (1933).

OHIO:

State, ex. rel, Lattanner v. *Hills*, 94 Ohio St. 171, 113 N. E. 1045, 1047 (1916).

OKLAHOMA:

First National Bank v. *Boxley*, 129 Okla. 159, 264 Pac. 184, 187 (1927).

OREGON:

Putnam v. *Chase*, 106 Ore. 440, 212 Pac. 365 (1923).

PENNSYLVANIA:

State Bank of Pittsburg v. *Kirk*, 216 Pa. 452, 65 Atl. 932, (1907);

Lyons v. Benney, 230 Pa. 117, 79 Atl. 250, 251, (1911);

Warren National Bank v. *Jamieson*, 301 Pa. 45, 151 Atl. 672, (1930).

SOUTH CAROLINA:

Arthur v. Brown, 91 S. Car. 316, 74 S. E. 652, 654 (1912).

TEXAS:

Shaw v. Borchers, 46 S. W. (2d) 967, 969, 970, (Tex, Civ. App.) (1930);

Brand v. *Korth*, 99 S. W. (2d) 285 (Texas 1936);

Federal-American National Bank v. Scott, 103 S. W. (2d) 1064 (Tex. Civ. App. 1937).

UTAH:

See *Riches* v. *Hadlock*, 80 Utah 265, 288, 15 P. (2d) 283, 292 (1932).

VERMONT:

West Rutland Tr. Co. v. *Houston*, 104 Vt. 204; 158 Atl. 69, 71-72 (1932).

VIRGINIA:

See *Webb* v. *Pleasants*, 144 Va. 516, 519; 132 S. E. 175, 176 (1926).

WASHINGTON:

Moore v. *Kildall*, 111 Wash. 504; 191 Pac. 394 (1920).

WISCONSIN:

Schwenker v. *Teasdale*, 206 Wisc. 275, 239 N. W. 434, 437-438 (1931).

See also:

Allen v. *Hay*, 64 Can. S. C. 76; 69 Dom. L. R. 193 (1922); (Note) 38 Harvard Law Review 239; (Anno.) 64 A. L. R. 595, 601-605.

Those cases which appear in bold type contain particularly clear and persuasive statements of the rule. In order to avoid cumulative repetition we will not attempt to analyze and discuss each of the aforementioned decisions but

will confine our remarks to only a few typical examples of the decisions.

In the case of *Iglehart* v. *Todd*, 203 Ind. 427 178 N. E. 685, the president of a state bank induced three of his friends to execute promissory notes payable to the bank for which no consideration was paid. The bank had suffered a theft of certain bonds causing a depletion of its capital and the state bank examiners had insisted that the impairment of capital be corrected. The president of the bank appears not to have explained to the three makers of the notes the full circumstances which prompted him to ask for the notes and appears to have given assurances to the several makers that in signing and delivering the notes they were not incurring any personal liability. It did not appear that the makers knew or suspected that their notes were to be used in connection with any deception of the bank examiners. The president gave to each of the makers his personal guarantee against loss. After obtaining the notes the president took $100,000 of municipal bonds owned by the bank, deposited them with the bank examiner as security for the depositors under an escrow agreement, and caused entries to be made on the books of the bank by which the notes in question supplanted the escrowed bonds so that no depletion of assets was apparent on the books of the bank. The escrowed bonds were accepted by the Commissioner of Banks as a temporary expedient pending the issue of additional stock to restore the depleted capital resulting from the theft. The bank examiners and the Commissioner of Banks relied upon the notes as valid assets of the bank and, supposing that the stability of the bank had been restored, permitted it to remain open for a considerable period until the examiners discovered that the notes were in the nature of accommodation notes and reported the fact to the Commissioner, whereupon the bank was closed and a receiver appointed therefor.

The makers of the notes brought suits against the receiver seeking the surrender and cancellation of the notes

on the ground that they were not enforceable because of lack of consideration. The receiver filed cross actions seeking to recover on the notes. The Supreme Court of Indiana wrote an exhaustive opinion to the effect that the makers of the notes were *estopped* to deny their liability on the ground that to sustain the defense of lack of consideration would have the effect of endorsing a fraud upon the public, the depositors and other creditors of the bank. In the course of its opinion the court stated, at 178 N. E. 690:

> "The banking business is one of public concern, and it is regulated and examined by a department of the state government in order that the public may be protected and not be misled. Those who participate in a transaction by which the assets of a bank are given a favorable appearance for the purpose of examination, but less favorable for purposes of liability or enforcement, are participating in a transaction which is fraudulent as to the public, and as to the creditors and depositors, in whose behalf the regulation of banks is imposed, . . .
>
> "Where one by giving accommodation notes is instrumental in clothing a bank with such an appearance of genuine assets as induces a bank examiner to regard it as sound, and to permit it to continue in business, and where in its published reports such person's notes figured as resources, and the public relies thereon and intrusts the bank with its money, the maker of the note is *estopped,* as against the creditors, to say that his notes were other than what on their face they purported to be, or that the appearance which was given to the books of the bank was not genuine. . . . If, by reliance upon such securities, depositors were induced to make and leave deposits in the bank, then upon the clearest principles of justice and morality the maker of the securities should be *estopped* from denying their validity. . . ." (Italics ours.)

The decision further stresses the point that notes given under such circumstances are not "accommodation" notes and that the immunity which the law gives to an accommo-

dation maker in the absence of the negotiation of his note to a third party cannot be invoked to relieve the maker from liability after the bank becomes insolvent, since upon the insolvency the rights of the depositors and creditors intervene to raise the estoppel. A review of this case appearing in 45 Harvard Law Review, page 926, points out that it follows *Denny* v. *Fishter,* 238 Ky. 127 (1931), in holding the maker of an instrument liable upon his promise even though he was wholly innocent of any intentional wrong-doing.

In *Hurd* v. *Kelley,* 78 N. Y. 588 (1879), an action was brought by the receiver of a state bank upon a bond executed by the defendant and other obligors named therein. It appears that the assets of the bank had become impaired in a substantial amount. The bond was executed for the purpose of being exhibited to the banking department of the State as an asset of the bank so that the bank might be enabled to continue its business. It was contended by the defendant that the bond was void for want of consideration but the court held this position was untenable because the bank did continue to operate as a going concern for almost two years after the bond was executed and that:

> "The continuance of its business and the incurring of new obligations by the bank, incident to such continuance, was a good consideration." (78 N. Y. at 596.)

The defendant attempted to defend on the ground that there was a fraudulent concealment of the condition of the bank by the person who solicited the defendant to sign the bond. The court, however, held this defense invalid because the defendant knew that the bond was to be treated as an asset and was to be used for the purpose of enabling the bank to continue its business, and that new obligations to depositors would be entered into on the faith of the supposed solvency of the institution. In this connection the court stated, at page 597:

> "Under such circumstances it would be gross injustice to permit the defendant, after having aided the bank to procure credit with the community, to avoid, as against depositors and creditors, the payment of his bond on the allegation that the exact condition of the bank was not disclosed to him, or that it was much worse than was represented. The dealings between him and the officials of the bank, at whose request he signed the bond, ought not, in justice, to be allowed to affect the security given by him for the protection of those dealing with the bank and who must be presumed to have relied thereon in their dealings."

This case was soon followed by *Best* v. *Thiel*, 79 N. Y. 15 (1879). In that case the receiver of a state bank sought to foreclose a morgtage which had been given to the bank to conceal a deficiency in the assets of the bank and to enable it to continue its business. The defendant pleaded a lack of consideration. The court stated at page 18:

> "It was reported to the banking department as a portion of the assets and was in effect represented to the depositors of the bank as a portion of the assets, and all this was done by the defendant and with his knowledge and assent. It was in consequence of this and other securities given by other trustees, that the superintendent of the banking department, acting officially for the public and all creditors of the bank, permitted the bank to continue its business. It was in reliance upon this and the other securities given, that depositors were induced to make and leave deposits in the bank; and hence, upon the clearest principles of justice and morality, the defendant should be *estopped* from denying the validity of this mortgage." (Italics ours.)

In *Murphy* v. *Gumaer*, 18 Colo. App. 183 70 P. 800 (1902), an action had been instituted by the receiver of an insolvent national bank upon a note. One Blake owned a majority of the stock of the bank. The bank had made excessive loans to Blake and companies controlled by him and overdrafts had been permitted to the same parties. In order to con-

ceal the loans and overdrafts from the bank examiners, Blake induced the defendant to sign a note payable to the bank and several other notes payable to Blake's companies. The latter notes were indorsed by the companies and discounted by the bank and the proceeds were used for the above-mentioned purpose. Blake disclosed to the defendant his purpose and the entire situation and promised that the defendant would not be held liable on the notes. In holding the defendant liable the court stated, at 70 P. 802:

> "We do not think he is in a position to say that the books did not speak the truth. This controversy is not between the bank and the defendant. The suit was brought by the receiver, and he is a representative of the creditors of the bank. . . . In accordance with the provision of the national banking act, it is his duty to cause debts due to the bank to be collected, and its property to be sold, and, if necessary for the payment of the debts due from it, to enforce the individual liability of the shareholders. He pays over the money he receives to the treasurer of the United States, subject to the order of the comptroller; and the latter, after full provision has been made for refunding any deficiency in redeeming the notes of the bank, makes, from time to time, ratable dividends on the claims of creditors which have been proven; and what is left, if anything, is paid over to the shareholders. That the bank had creditors,—that it received deposits and did a general banking business,—the evidence abundantly shows. The defendant was instrumental in clothing the bank with such an appearance of genuine assets as induced the comptroller to regard it as sound, and to suffer it to continue in business. In the reports which were transmitted to him these notes figured as resources, and the public had a right to rely on the reports when they were published. If the defendant was not liable on the notes, the comptroller was deceived, and the persons who dealt with the bank, and intrusted it with their money, were also deceived. However valid the defense might be if the bank were plaintiff, the defendant, who, when he gave the notes, knew exactly the purpose for which they were to be used, is *estopped* to

> say, as against the creditors, that they were other than what, on their face, they purported to be, or that the appearance which was given to the books was not genuine." (Italics ours.)

The Supreme Court of Pennsylvania took a similar view in *Lyons* v. *Benney,* 230 Pa. 117 (1911). In that case, the receiver of an insolvent national bank instituted suit against the maker of a note given to the bank without consideration for the purpose of substituting it for the note of a third party which had been criticized by the bank examiner. The defendant had executed the note after an agreement had been entered into with officers of the bank to the effect that he would not be liable thereon. In holding the defendant liable, the court acknowledged the general rule that the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself and that a defendant in a suit brought by such a receiver may take advantage of any defense that might have been made if the suit had been brought by the corporation before its insolvency, but then forcefully commented at page 119:

> " . . . it is equally true that when an act has been done in fraud of the rights of the creditors of the insolvent corporation, *the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself.* In such a case he may maintain an action which the corporation itself could not." (Italics ours.)

The court further commented on page 120:

> ". . . this appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for thier benefit."

and again on page 121:

> " . . . one who voluntarily gives his obligation to a bank for the purpose of taking up another obligation,

and of being exhibited as one of its assets to a supervising officer of the government having supervision and control of its affairs, is *estopped* to deny want of consideration upon the insolvency of the bank when a receiver brings an action upon the note for the benefit of the creditors of the institution." (Italics ours.)

The Supreme Judicial Court of Massachusetts has squarely adopted the doctrine here contended for. In *Prudential Trust Co.* v. *Moore et al.*, 245 Mass. 311, 139 N. E. 645 (1923), the receiver of an insolvent state bank sued upon certain notes executed by directors of the bank for the purpose of concealing various excessive loans and overdrafts. The notes had been executed at the request of the president of the bank who disclosed the purpose for which the notes would be used but concealed the fact that the maker of the excessive loans was on the verge of insolvency. The defendants pleaded lack of consideration and misrepresentation on the part of the president of the bank. The defendants were held liable to the receiver of the bank. The court, after disposing of the defense that the president of the bank had assured the defendants that they would not be liable on the note, said on page 316:

"Further, a short answer to both defenses is that the defendants are *estopped* from denying the legal validity of these notes, which the bank commissioner is now attempting to collect for the benefit of creditors of the bank. They knew when they signed the notes that the assets of the bank were materially impaired by illegal loans to the dredging company; and that the proceeds of the notes in suit were to be used to prevent the closing of the bank. *They knew that these new assets would enable the bank to continue doing business, retain deposits of existing customers, and presumably obtain new deposits and credits.* To permit the defendants, who by these notes enabled the bank to appear to the public as a solvent concern, now to plead the invalidity of the very securities by which they induced others to make and leave deposits with the bank, would be unjust and fraudulent; . . ." (Italics ours.)

Although in the cases at bar it is the receiver of an insolvent national bank who brings the actions for the benefit of the depositors and creditors of the bank, there is substantial authority in support of the proposition that in cases of this kind where apparent obligations have been given the appearance of validity for the express purpose of deceiving the banking authorities, and through them the depositors and creditors, the bank itself could invoke the doctrine of estoppel to defeat defenses such as are attempted to be set up in the instant cases. See *Bay Parkway Natl. Bank* v. *Shalon*, 270 N. Y. 172, 200 N. E. 685, (1936); *Mount Vernon Trust Co.* v. *Bergoff*, 272 N. Y. 192, 5 N. E. (2d) 196, (1936); *Tarrytown Nat'l Bank & Trust Co.* v. *MacMahon*, 293, N. Y. S. 513 (1937); *Bangor Trust Co.* v. *Christine*, 297 Pa. 64, 146 Atl. 545 (1929); *Rogers* v. *First State Bank*, 79 Colo. 84, 243 Pac. 637, (1926); *Cedar State Bank* v. *Olson*, 116 Kan. 320, 226 P. 995 (1924).

3. Decisions Relied Upon by Respondents and the Courts Below.

The decision in the case of *Rankin, Receiver*, v. *City National Bank*, 208 U. S. 541, 52 L. Ed. 610 (1908), was practically the sole basis of the decision of the United States District Court overruling the conclusions of the Master in the cases at bar and was the principal case relied upon by the Circuit Court of Appeals in affirming the decision of the United States District Court. In view of this fact, we have undertaken to examine and analyze the record and briefs submitted to this Court by counsel for the respective litigants in the *Rankin* case in order to show the factual situation upon which the decision of this Court was based and to establish that the opinion therein is inapplicable to the cases at bar.

In our statement of the facts involved in the *Rankin* case we will refer to the record in that case as "(*Rankin* Record ....)".

In that case a national bank examiner had criticized three loans of the Capitol National Bank of Guthrie, Oklahoma, hereinafter referred to as the Guthrie bank. Two of these notes had been written and signed by Charles E. Billingsley as treasurer and vice-president of the corporate makers (*Rankin* Record 18), but Billingsley was not personally liable upon them (208 U. S. 541, 543).

In order to take up these criticized notes an arrangement was made by Billingsley, who was president of the Guthrie bank, with the City National Bank of Kansas City, Missouri, whereby Billingsley gave to the City National Bank his personal note in the amount of $30,000 on September 9, 1903 (*Rankin* Record 16), under an agreement (signed by him as president of the Guthrie Bank) that the amount of the loan would remain on deposit with the City National Bank until the note was paid and that the City National Bank should have the right to charge the note against the account at any time (*Rankin* Record 16). The amount of the $30,000 loan on the Billingsley note was first credited to a personal account of Billingsley in the City National Bank (*Rankin* Record 19). Billingsley gave to the Guthrie bank his personal check for $30,000 drawn on the City National Bank (*Rankin* Record 17). The amount of that check was credited by the Guthrie bank to Billingsley's personal account in the Guthrie bank (*Rankin* Record 17) and then sent on to the City National Bank where it was honored and charged against Billingsley's account (*Rankin* Record 19) and credited to the Guthrie bank account. However, later, on the same day, the officer of the City National Bank who had entered into the arrangement with Billingsley became aware of the manner in which the transaction had been handled and, in accordance with his understanding with Billingsley had the entries reversed so that a "special" account was established on the books of the City National Bank in favor of the Guthrie bank with a credit in the amount of $30,000 and a charge in a like amount was made to the Guthrie bank's "general" account in the City Na-

tional Bank (*Rankin* Record 19). By this procedure an additional paper credit of 30,000 was provided wherewith Billingsley, or the Guthrie bank, could purport to remove the three criticized loans in the approximate amount of $30,000 from the Guthrie bank's assets.

To carry out the plan, Billingsley gave to the Guthrie bank his personal check drawn against his personal account in the Guthrie bank in the amount of $30,000; the amount of this check was charged against his personal account and credited to bills receivable and the three criticized notes were then purportedly taken out of the assets. On September 9, 1903, Billingsley addressed a letter to the bank examiner, advising him that he had had paid to the bank the three criticized loans (*Rankin* Record 18). There is nothing in the record to show whether the examiner received this letter or whether he ever relied thereon.

On November 9, 1903, the City National Bank charged Billingsley's note of $30,000 against the "special" account of the Guthrie National Bank. However, shortly thereafter the transaction was virtually renewed but in the amount of $25,000.00 rather than $30,000 (*Rankin* Record 21-26), and the $25,000 was credited by the City National Bank to the Guthrie bank's "special" account on December 7, 1903 (*Rankin* Record 24). The note used in this latter transaction was charged by the City National Bank against the "special" account of the Guthrie bank at 10:00 A. M., April 4, 1904, and the cancelled note was returned to Billingsley (*Rankin* Record 27). At 2:00 P. M., on the same day the Guthrie bank was closed because of insolvency. (*Rankin* Record 28.)

All during the period covered by these transactions the Guthrie bank's books showed only one account in the City National Bank, whereas the City National Bank's books showed two account in the name of the Guthrie bank, a "general" account and a "special" account (*Rankin* Record 26). Monthly statements were rendered to the Guthrie bank by the City National Bank showing the status of both

accounts. At the time Billingsley's $25,000 note was charged against the "special" account the City National Bank had no knowledge whatsoever of the Guthrie bank's failing condition. (*Rankin* Record 28.)

The findings of fact of the District Judge definitely show that it was customary for the Guthrie bank to borrow money in either of two ways: (1) By issuing its certificates of deposit payable either to Charles E. Billingsley or others and causing such certificates of deposit to be negotiated and delivered to banks, upon negotiation of which credit would be taken in the account current in the Guthrie bank with the bank from which such loan was made; or (2) By issuing the notes of the bank and crediting the proceeds to the personal account of Charles E. Billingsley in the Guthrie bank, upon which as payments were made upon such loans so credited to such account, checks would be made, reciting therein payment, or part payment, of the particular loan for which the check was drawn, and such checks were signed either by Billingsley or in the name of Billingsley by the cashier. The personal account of Billingsley was also used for his private deposits and personal checks. (*Rankin* Record 29.)

Upon the aforementioned facts the District Judge in a memorandum opinion (*Rankin* Record 59) held that the two note transactions were "bank" transactions and not "personal" transactions of Billingsley. He further held that the transactions were for the bank's benefit and not for Billingsley's benefit and that the contract between the two banks was valid. The District Judge specifically commented that in answer to a question by the court, counsel for both sides stated that no contention was made that the contract was illegal because it was one which would enable the Guthrie bank or Billingsley, its president, to make a false showing of the condition of the bank to the bank examiner or to the Comptroller.

The case was taken to the Circuit Court of Appeals for the Eighth Circuit, where in an opinion reported in 144 Fed. 587, under the title of *Cherry* v. *Nat. Bank*, the decision of the District Court was upheld.

Thereafter the case was taken to this Court and it is interesting to note the arguments presented by counsel for the respective litigants. In the brief filed in behalf of Rankin as Receiver of the Guthrie bank, the argument was based almost entirely upon the contentions that the notes executed by Billingsley evidenced his own individual obligations and not those of the bank, that in borrowing the $30,000 from the City National Bank, Billingsley had undertaken to pledge the deposit of the Guthrie bank as collateral security for his loan, that Billingsley had no authority to make such a pledge and that his act was not and could not be ratified by the bank because a national bank cannot hypothecate its funds as collateral security to the debt of another.

The contention of the counsel for Rankin is summarized in the first three paragraphs of their brief under the caption **"Argument"** as follows:

> "The real controversy is whether or not the loans evidenced by Billingsley's notes were his individual obligations or bank transactions.
>
> "If they were bank transactions, made for the benefit of the bank, and if the bank received and appropriated the proceeds thereof, it is our opinion that the judgment of the lower court should be affirmed.
>
> "If, on the contrary, they were not for the benefit of the bank, and if the bank did not get the proceeds, the judgment should be reversed."

The arguments contained in the brief submitted by counsel for the Defendant in Error are summarized on page 21 thereof. It is there contended that the notes and special deposits were bank transactions and not personal transactions between Billingsley and the City National Bank, that the Guthrie bank recognized and ratified the transactions and contracts of Billingsley with the City National Bank as made for its use and benefit, and that the transactions and contracts were within the power of the Guthrie bank and within the authority of its president since the

money was borrowed for the use of the Guthrie bank. A considerable portion of the brief deals with the power of the bank as such to borrow money and the power of bank officers to borrow in behalf of the bank.

Upon consideration of the facts set forth in the record and the contentions made in the briefs filed in behalf of the litigants, this Court affirmed the decision of the Circuit Court of Appeals and in so doing stated (208 U. S. 541, 546):

> "If the Guthrie bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

Much has been made of this language by the Surety Company in the lower courts in the cases at bar. Both the Circuit Court of Appeals below and other Federal courts have apparently considered the aforequoted language as establishing a general rule that a receiver of an insolvent bank stands no better than the bank itself. The foregoing review of the arguments presented to this Court in the *Rankin* case conclusively disposes of any contention that it was the intention of this Court to establish any such rule by the aforesaid language. At no point in either brief was it argued pro or con that a receiver of an insolvent national bank has rights other than those which the bank had while it was operating as a going concern. The whole argument of the receiver in that case was as aforenoted that the notes executed by Billingsley were for his own accommodation and that the bank did not in fact and could not in law ratify the attempted pledge of the Guthrie bank's deposit in the City National Bank to secure the personal obligation of Billingsley. The decision of this court virtually determined that the transaction was for the benefit of the bank rather than for the benefit of Billingsley, that the Guthrie bank's deposit account in the City National Bank had been used to pay its own liability and that, therefore, there could be no recovery.

At the end of the opinion Mr. Justice Holmes commented on the fact that neither party contended that the contract was illegal and then suggested that even if the contract relating to the use of the "special" deposit to pay the Billingsley note had been illegal, the receiver would have stood no better. It is not wholly clear just what Mr. Justice Holmes had in mind in making this suggestion by way of dictum, but if he meant that the receiver must take the contract between the two banks just as it was made and subject to all burdens or conditions, then such dictum is not in accord with the rules of law respecting receivers of national banks as subsequently developed and recently declared by this Court in the cases of *Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, (supra); *City of Marion* v. *Sneeden*, 291 U. S. 262 (supra); and *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209.

Neither of the briefs urged the point relied upon in the instant cases of an estoppel arising out of a reliance by the bank examiners and the Comptroller upon the deposit account of the Guthrie bank in the City bank being unencumbered. The receiver was content to rest his position solely on the contention that Billingsley was acting personally and not as agent of or for the benefit of the Guthrie bank. This issue of fact was decided against him.

On the facts set forth in the record the estoppel doctrine here urged could not have been raised because a reliance by either bank examiner or the Comptroller was not proven and because there was no showing that the depositors and other creditors suffered any loss whatsoever by reason of any reliance on the unencumbered status of the Guthrie bank's deposit account in the City bank; as a matter of fact, the loss, if any, was sustained by the making of the excessive loans by the Guthrie bank prior to its insolvency and not as a result of the transaction whereby the said excessive loans were purportedly removed from the assets of the bank. It is significant therefore, in that case, that no one was injured by the transaction with the City bank be-

cause the notes representing the excessive loans which the examiner had criticized remained the property of the Guthrie bank (144 Fed. 593 and 208 U. S. 545). Furthermore, the estoppel doctrine here urged could probably not have been raised in that case because the record did not disclose that the credit supplied by the City bank in any way operated to keep the bank open for any period of time with consequent loss to depositors and other creditors. Therefore, it cannot be presumed that this Court, in rendering its decision in the *Rankin* case, had in mind the doctrine of estoppel which we are urging in the instant cases, when that doctrine was neither invoked by the litigants nor even mentioned in the briefs submitted to this Court by their respective counsel.

It is submitted, therefore, that the *Rankin* case is not in any way comparable with or applicable to the instant cases, because of the differences in the facts and in the legal principles upon which the parties litigant have conceived their respective rights and defenses to rest, and that it did not lay down any general rule to the effect that a receiver of an insolvent national bank never has any different or greater rights than the bank itself.

In addition to the *Rankin* case, the Circuit Court of Appeals below cited the following cases as authority for the proposition therein laid down that the receiver should not recover in the instant cases because the bank could not have recovered and the receiver stands no better than the bank itself; *Cutler* v. *Fry*, 240 Fed. 238, (D. C. Kan. 1915); *Yates Center National Bank* v. *Schaede*, 240 Fed. 240, (D. C. Kan. 1915); *Yates Center Nat. Bank* v. *Lauber*, 240 Fed. 237, (D. C. Kan. 1915). These cases were all decided by the same court on the same day and appear to rest upon the court's interpretation of the case of *Rankin* v. *City National Bank, supra*, to the effect that a receiver of an insolvent national bank never stands better than the bank itself. Judge Pollock, who wrote the opinions, expressed reluctance that he must come to such a conclusion. He recognized the exist-

ance of the contrary doctrine as laid down in the case of *Pauly* v. *O'Brien*, 69 Fed. 460, but appears to have felt compelled to deny the receiver the right to recover because of the holding in the *Rankin* case. The rationale of Judge Pollock's decisions appears to be that a receiver cannot have the benefit of a promise contained in a note without assuming the burden of the bank's counter-promise that the note will not be enforced. Since the decisions in these three District Court cases, however, this Court has decided that a national bank itself or its receiver may after its insolvency enjoy the benefits of a contract without assuming its burdens. See *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 79 L. Ed. 1393 (1935); *Texas & Pac. R. Co.* v. *Pottorff, Receiver*, 291 U. S. 245, 78 L. Ed. 777 (1934); and *City of Marion* v. *Sneeden, Receiver*, 291 U. S. 262, 78 L. Ed. 787, (1934).

The case of *Skud* v. *Tillinghast, Receiver*, 195 Fed. 1 (C. C. A. 6th) (1912) also cited by the Circuit Court of Appeals below, likewise applied what we contend to be an erroneous construction of the language contained in *Rankin* v. *City National Bank, supra.*

The case of *Peterson* v. *Tillinghast*, 192 Fed. 287 (C. C. A. 6th) (1911) was also cited by the Circuit Court of Appeals below. In that case Peterson had given his note, payable to the bank, at the request of an officer of the bank upon an express understanding that it was given for the accommodation of the bank and upon an express agreement that the bank would provide for its payment and never call upon the maker for payment. The case was tried before a jury in the United States District Court and a verdict ordered for the plaintiff (the receiver of the defunct bank). The Circuit Court of Appeals, after commenting on the *Rankin* case, used the following language (p. 292):—

> "The infirmity of the opinion below was in treating Peterson's knowledge of the proposed discount of the note as conclusive evidence of an intent that the note should be used for an illegal purpose. If it can be said

under the decision in the Rankin case that the knowledge so imputed to Peterson would render him liable on the note, we think the question of the existence of such knowledge was one of fact for submission to the jury under appropriate instructions. The rules of estoppel urged are inapplicable, because (1) the case was disposed of upon a theory alone of law forbidding Peterson to deny liability; and (2), if the case had been submitted to the jury upon questions of fact, the evidence as adduced would have been lacking in some of the essential ingredients of estoppel. Henshaw v. Bissell, 18 Wall. 255, 271, 21 L. Ed. 835; Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 335, 336, 23 L. Ed. 927. As to misrepresentations made to the bank examiner and also to the Comptroller and depositors through false entries in the bank's books and newspaper publications alluded to in the opinion below, the Rankin case is in point."

The case was remanded to the District Court and a new trial ordered. It is somewhat difficult to determine from the opinion of the court what view it entertained as to the full scope and meaning of the holding in the *Rankin* case, but we submit that that court was of opinion that the *Rankin* case supported the proposition that if the maker of the note intended that it should be used to deceive the bank examiners, he would be estopped to deny his liability. It would appear that the order remanding the case for a new trial was based upon the theory that the question of Peterson's intention respecting deception of the bank examiners was a question of fact for the jury and that, therefore, the trial court had erred in ordering a verdict against him without permitting the jury to pass upon this essential question of fact.

The Circuit Court of Appeals in the instant cases also cited as authority for its ruling the cases of *Burrows* v. *Nimocks,* 35 F. (2d) 152, (C. C. A. 4th) (1929), and *Schumacher* v. *Eastern Bank and Trust Company,* 52 F. (2d) 925, (C. C. A. 4th) (1931). Both of these cases dealt with the question of whether a receiver of a national bank was

bound by an agreement with a depositor, whereby the bank pledged collateral to secure a loan or deposit. In the *Schumacher* case the court found as a fact that the transaction between the defunct bank and the defendant bank involved a loan and not a deposit and held that the defunct bank had a right to pledge its assets to secure a loan. In the *Burrows* case the defunct bank had pledged certain of its assets to secure a deposit of county funds; the Court held that in so doing the officials of the defunct bank acted within their legal authority and that since the bank itself was bound by its agreement with its depositor, the receiver likewise was bound. Both of those cases were decided prior to the year 1934 when this Court decided the cases of *Texas and Pac. R. R. Co.* v. *Pottorff, supra,* and *City of Marion* v. *Sneeden, Receiver, supra,* wherein it was held that a national bank has no authority to pledge its assets to secure a deposit except to the extent specifically permitted by statute and that a receiver of a bank may re-claim collateral so pledged without authority and leave the depositor in the position of an unsecured creditor.

The case of *Keyes* v. *First National Bank of Aberdeen,* 20 F. (2d) 678, (D. C. So. Dak.) (1927), wherein it was held that the receiver of a national bank could not recover from the defendant bank the amount of its deposit accounts therein, which had been applied by the defendant bank upon notes of officers of the insolvent bank, was in reality based upon findings that a portion of the funds provided by the defendant bank on the said notes was used for the benefit of the insolvent bank, that over a long period of years the officers of the defunct bank had been authorized to use bank funds in payment of their personal obligations, and that in the vicinity wherein the banks were located it was the common practice for banks to lend money to other banks upon the individual notes of officers thereof.

There are other cases which appear to hold that in instances where the bank as a going concern could not recover upon an obligation held by it the receiver thereof cannot re-

cover, which cases were not cited by the Circuit Court of Appeals in the cases at bar. See: *Hookway* v. *First National Bank,* 36 F. (2d) 166, (C. C. A. 8th) (1929); *Andresen* v. *Kaercher,* 38 F. (2d) 462, (C. C. A. 8th) (1930); *Lensing* v. *Kayser,* 41 F. (2d) 224, (C. C .A. 5th) (1930); *Kaercher* v. *Citizens National Bank,* 57 F. (2d) 58, (C. C. A. 8th) (1932); and *Bosworth* v. *Cady,* 72 F. (2d) 62, (C. C. A. 7th) (1934). In each of these cases, the Courts fell into the error of the District Court in *Cutler* v. *Fry,* 240 Fed. 238, and *Yates Center National Bank* v. *Lauber,* 240 Fed. 237. Most of them applied an erroneous construction of the *Rankin* case and all of them failed to give any consideration whatsoever to the fact that the rights of a receiver may be derived through the creditors of an insolvent bank rather than the bank itself, in instances where the representatives of the depositors and creditors, *i. e.,* the Comptroller of the Currency and his examiners, in carrying out the duties imposed upon them by law, have relied upon the apparent validity of an obligation held by the bank, to the detriment of the creditors and depositors thereof.

Under the principles of law applied in those cases above discussed and which are relied upon by the Surety Company and were relied upon by the Circuit Court of Appeals below, an individual maker of a promissory note, given to a bank with the express intent that it should have the appearance of a sound asset of the bank and be so regarded by the bank examiners, can escape liability after the bank becomes insolvent by pleading lack of consideration even though the maker upon inquiry by the bank examiners had assured them that the note was an enforceable asset of the bank. This contention on the part of the Surety Company denies to the Comptroller and his examiners any position in the administration of the national banking system other than that of mere supervisors who represent not the creditors and depositors but only the Government itself. Thus, the Surety Company's defense rests upon the astounding proposition that the depositors and other creditors of a national bank

may be despoiled by a conspiracy, if only a single faithless bank official can be made a party to the conspiracy, and that when the Government as the guardian of the interests of the depositors steps in to salvage for the benefit of the depositors such assets as may remain after the thievery has been discovered, the conspirator whose promissory obligation was the instrument of the fraud may escape liability by showing that the obligation was not supported by any consideration moving from the bank to the promissor or that the faithless bank official agreed, purportedly on behalf of the bank, that the obligation would not be enforced against the promissor and that the obligation was to be treated as mere "window dressing" for the examiners to rely and act upon.

It is submitted that the above discussed decisions of the inferior Federal courts upon which the Surety Company relies have resulted from the error of applying rules and principles of law which were inapplicable to cases wherein insolvent banks were involved. This error appears to have arisen through a misapprehension of the scope, meaning and rationale of the *Rankin* case, *supra,* and from a failure to appreciate the special principles which govern when a national or other public banking institution becomes insolvent and the rights and interests of its depositors and creditors are in issue as distinguished from the rights and interests of the stockholders of the insolvent bank, who prior to insolvency had been its real proprietors.

On the other hand, it is submitted that the State court cases and the Federal court cases heretofore cited as being in accord with the Receiver's contention recognize the special factors which are involved in the case of an insolvent public banking institution and that while the controlling rules of law are somewhat differently stated in the several cases and in certain instances are stated differently from the manner in which they have been developed in this brief, nevertheless they all rest upon the same conception as to the governing principles of law which find their support in

considerations of equity and public policy and the application of the doctrine of equitable estoppel.

D.

The estoppel applies to prevent the Surety Company from denying the authority of its agent, Cliff, to execute the note guaranty bonds here in issue.

It is our contention that this doctrine of estoppel is available to the Receiver in the instant cases to prevent the Surety Company from denying the authority of its agent, Cliff, to execute the note-guaranty bonds which are the subject of this litigation. It is the Receiver's contention that by reason of the fact that Cliff's power of attorney included the express authority to write obligations of the type here in question and by reason of the fact that this authority was buttressed and supported by certified and authenticated duplicate originals of the powers of attorney furnished by the Surety Company for use as proof of his authority and by reason of the fact that the powers of attorney included an unrestricted ratification of whatever Cliff did within the scope of the written authority, the Surety Company is estopped to deny Cliff's authority and its own express ratification of his acts. The presence of these factors in the instant cases forbids the application of the so-called "two innocent party rule" and brings the case within another well recognized rule of law to the effect that one who has armed an agent with all the indicia of authority is estopped from denying that the agent abused this authority when innocent third parties have actually relied to their injury upon the principal's representation of authority. *National Safe Deposit etc. Co.* v. *Hibbs*, 299 U. S. 391, 57 L. Ed. 1241, (1913); *Russell* v. *American Bell Telephone Co.*, 180 Mass. 467, 62 N. E. 751 (1902); *Tower* v. *Stanley*, 220 Mass. 429, 107 N. E. 1010, (1915); *Loring* v. *Goodhue*, 259 Mass. 495, 156 N. E. 704, (1927); *Denecke* v. *West*, 184 Iowa, 600, 169 N. W. 97, (1918); *Astoria National Bank* v. *State Bank of*

Portland, 109 Ore. 699, 704, 222 Pac. 598, (1924); *Dair* v. *United States,* 83 U. S. 1, 21 L. Ed. 491, (1873); and see Sec. 261 of the *Restatement* of the *Law* of *Agency* prepared by the American Law Institute.

The Surety Company contended in the courts below that it should not be held liable because Cliff's purpose in giving the bonds with the supporting powers of attorney was to deceive the bank examiners and that in so doing he repudiated his agency relations with the Surety Company and acted solely in his own interest. This statement of the issue begs the question. The remedy here sought does not lie in tort for deceit, the rights here sought to be enforced rest upon principles of contract. The estoppel arises because the Surety Company furnished Cliff with documents sealed and authenticated, which on their face appeared to establish indisputable proof of Cliff's authority. It furnished these evidences of authority to Cliff with the express intent on the part of its directors and responsible executive officers that they should be used to satisfy all persons who might have reason to inquire as to Cliff's authority to execute promissory obligations in the name of the Surety Company that he had such authority, and Cliff used these instruments in the instant case for the exact purpose for which his principal furnished them to him. His motive in so doing is not disclosed on the record. There is no evidence that Cliff personally benefited financially or otherwise from his conduct in the premises. Add to these facts the undisputed reliance on the genuineness and validity of the bonds by the bank examiners acting in their official capacity, and by the Comptroller and the additional fact that by reason of this reliance the unsound condition of the Bank was not discovered, so that the Bank remained open and was further looted by the conspirators, and every element required to establish the estoppel contended for is present.

E.

The estoppel applies to prevent the Surety Company from asserting the defense that the secret assurances given by Ragan to Cliff to the effect that the bank would not attempt to enforce the bonds relieves the Surety Company from liability.

It is the Receiver's contention that the Surety Company is estopped to assert as defenses the secret assurances, given by Ragan to Cliff to the effect that the Bank would not attempt to enforce the bonds, and the releases executed and delivered by Ragan to Cliff; at the same time the Receiver contends that the defenses, even though asserted, are ineffective to bar recovery.

When Cliff delivered the bonds, Ragan did assure him that they would never be enforced and that they would be returned to Cliff after they had been shown to the bank examiners as evidence that the loans secured by the bonds were amply secured. No other official of the Bank knew of these agreements. Such secret agreements made by bank officials have time and again been held unenforceable as against the receiver of a bank, *German American Finance Corporation* v. *Merchants & Manufacturers Bank,* 177 Minn. 529, 225 N. W. 891, (1929); *Prudential Trust Company* v. *Moore et al.,* 245 Mass. 311, 139 N. E. 645 (1923); *German American State Bank* v. *Watson,* 99 Kans. 686, 163 Pac. 637 (1917); *Arthur* v. *Brown,* 91 S. C. 316, 321, 74 S. E. 652 (1912); and *State Bank of Pittsburgh* v. *Kirk,* 216 Pa. 452, 65 Atl. 932 (1907). See also *Tanners National Bank* v. *Dean,* 283 Mass. 151, 155, 186 N. E. 219, (1933); *Doyle* v. *Nesting,* 37 Colo. 522; 88 Pac. 862, (1906); *Fed. Reserve Bank* v. *Crothers,* 289 Fed. 777, (C. C. A. 4th, 1923); and *Richardson* v. *Harwick,* 106 U. S. 252, 27 L. Ed. 145, (1882).

This Court has recently held in the case of *Awotin* v. *Atlas Exchange National Bank,* 295 U. S. 209, 79 L. Ed. 1393 (1935), that one who buys securities from a national bank under an agreement by the bank to repurchase the same at

an agreed price cannot enforce the contract of repurchase, and that the purchaser has no remedy for a breach of the bank's contract. Speaking for the court in that case, Mr. Justice Stone used the following language at page 214:

> "The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. . . . National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank."

This case appears to recognize the principle that in determining the rights and equities arising through dealings with a national bank consideration will be given by the courts to the question of whether or not the application of the usual rules of equity will serve to protect or to militate against the interests of the public and the depositors, and that the interests of the public and the depositors are held to be paramount.

The written releases given by Ragan to Cliff are no more effective as a defense than are the verbal assurances given by Ragan above disposed of. In the following cases, the fact that the agreement not to enforce an obligation in suit was in writing was not permitted to allow the defendant to escape liability. *German American Finance Corporation* v. *Merchants & Manufacturers Bank,* 177 Minn. 529 (1929) *supra; State Bank of Pittsburgh* v. *Kirk, supra; Mt. Vernon Trust Company* v. *Bergoff,* 272 N. Y. 192 (1936); *Rogers* v. *First State Bank of Aguilar,* 79 Colo. 84 (1926). This Court has held that the receiver of a national bank is not bound by illegal agreements made by bank officials with depositors providing that the bank would furnish and maintain collateral to secure the deposits. Such arrangements made

with the depositors respecting the furnishing of collateral are not binding on a receiver and upon recovering the collateral he is not obliged to refund the deposit. Under such conditions, the depositor is relegated to the position of a general unsecured creditor. *Texas & Pacific Ry. Co.* v. *Pottorff, Receiver,* 291 U. S. 245, 78 L. Ed. 777 (1934); *City of Marion* v. *Sneeden, Receiver,* 291 U. S. 262, 78 L. Ed. 787 (1934).

The president of a bank, without express authorization from the Board of Directors or other governing body of the bank, has no power to release an obligation held by the bank. See: *Westwater* v. *Lyons,* 193 Fed. 817, 821, (C. C. A. 3, 1912); *Prudential Trust Company* v. *Moore, et al., supra; Wagner* v. *Central Banking and Security Company,* 249 Fed. 145, 148, (C. C. A. 4, 1918).

The rationale of these decisions is based upon the peculiar and special character of public banking institutions and the special position held by their depositors in the eyes of the law, as has been developed more fully in the forepart of this brief.

III.

Discussion of Technical Points Relied Upon by the Court Below and the Technical Defenses Asserted by the Surety in the Lower Courts.

A.

The form of the pleadings does not stand in the way of a recovery by the receiver.

In its two opinions 90 F. (2d) 862, 866, the Circuit Court of Appeals imports into the instant cases the suggestion that had the pleadings been different, the Receiver might have recovered. The Court said in its first opinion, at page 866:

> "As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings."

And again in its second opinion the Court said, at page 867:

> "No issue is raised in the plaintiffs' brief except as to the validity of the bonds. The obligation of the surety company based on the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the surety company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiffs' counterclaims in the equity suits."

Since the gravamen of the Court's decision was to the effect that the Receiver could not recover in contract because the bank itself could not have recovered on the bonds, it would seem that the Court must have had in mind the possibility that the Receiver could have recovered had he based his action in tort for deceit. This suggestion, however, does not stand close analysis. The story of Cliff's part in the transaction was introduced in evidence by Cliff, who was called as a witness by the Surety Company. The Surety Company's answers to the actions at law and its bills of complaint seeking the cancellation of the bonds, made no reference to any intention on Cliff's part to deceive the bank examiners, but set forth only Cliff's lack of authority and the understanding between Cliff and Ragan as to the character of the transaction. Cliff's story as to the purpose to deceive the bank examiners might or might not have been believed. Obviously the Surety Company brought out the element of deceit on the theory that it would relieve it of liability.

The essence of the suggestion as to the defect in the pleadings seems to be that when the Master had found the facts in accordance with Cliff's testimony, so that the issue of fact therein involved was settled, the Receiver should have seized from the hands of the Surety Company the weapon which the latter claimed had struck down the Receiver's rights of action in contract and turned it upon the Surety Company in a new action of tort for deceit. The mere sug-

gestion calls to mind the theories of the medieval doctors who prescribed as a cure for dog-bite "the hair of the dog that bit you."

It seems unsound and irrational to say that the Receiver's rights rest in tort for deceit, because there will be no deceit and no injury unless the Surety Company is permitted to deny its obligation set forth in the bonds over Cliff's signature, supported by the power of attorney which, admittedly, is broad enough in its terms to authorize the writing of the bonds in question. The bank examiners, the Comptroller, the directors, the depositors and other creditors will not have been deceived or injured if the Surety Company is held to be estopped from denying Cliff's authority and consequently liable on its promises set forth in the bonds. The Receiver's right to recover on the contracts is predicated upon the thesis that public policy does not permit such a deceit to be practiced.

It would place an over-emphasis on the functions and importance of formal pleadings to hold that the Receiver must fail in his actions based upon the contracts contained in the bonds, because he laid his actions in contract, but that if he had phrased his declarations and counterclaims in language appropriate to actions of tort, he could have recovered (on the exact set of facts found by the Master) the same amount which he claims in his actions sounding in contract. Obviously the measure of damages would be the same in whatever frames the actions were set. Furthermore, it is significant that of the cases which have come before the courts of the several states and federal districts involving the questions here presented, all have been laid in contract based upon the instrument given to the bank concerned and never in any instance has it been suggested before that a different form of pleading should have been adopted by the Receiver.

If the alleged deficiency in the pleadings consists merely in the failure on the part of the Receiver to allege in the pleadings based on the contract that the bank examiners saw

and relied upon the bonds and that as a consequence the Bank was allowed by the Comptroller to continue its business with resulting loss to the depositors, and if the addition of these allegations would establish the Receiver's right to recover in contract, then it is obvious that this defect can be cured at any time by amendment, since the proof of such facts is established by the findings of the Master and there was no element of surprise to the Surety Company respecting the introduction thereof. U. S. C. Title 28, sec. 777; Equity Rule 19; *Seaboard Air Line Ry.* v. *Pennsylvania*, 241 U. S. 290, 294, 60 L. Ed. 1006, (1916); *Clinchfield R. Co.* v. *Dunn*, 40 F. (2d) 586, (C. C. A. 6) (1930), Cert. den. 282 U. S. 860, (1930); *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 60 L. Ed. 609, (1916); *Richmond* v. *Irons*, 121 U. S. 27, 30 L. Ed. 864, (1887); *New York Central R. R.* v. *Kinney*, 260 U. S. 340, 67 L. Ed. 294, (1922); *Freiderichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. Ed. 1075, (1918).

This Court has held that where a deficiency in pleadings is found to exist upon a determination of the rules of law applicable to the facts found in the record, the Court will assume that the amendment has been made without formal proceedings to that end, when such assumption is required for a proper disposition of the case upon its merits as disclosed in the record. *Norton* v. *Larney*, 266 U. S. 511, 69 L. Ed. 413, (1925); *Smith* v. *McCullough*, 270 U. S. 456, 70 L. Ed. 683, (1926); *Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 69 L. Ed. 1015, (1925); *Howard* v. *DeCordova*, 177 U. S. 609, 44 L. Ed. 908 (1900); see also *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 58 L. Ed. 776, (1914); *United Light & Power Co.* v. *Grand Rapids Tr. Co.*, 85 F. (2d) 331, (C. C. A. 6) (1936), Cert. den. 299 U. S. 591, 618; *Midland Valley R. R. Co.* v. *Excelsior Coal Co.*, 86 F. (2d) 177, (C. C. A. 8) (1936).

If such is the only deficiency with respect to the pleadings, the Surety Company cannot now take advantage of it after it has tried the case before the Master and United States District Court and argued it on appeal before the Circuit

Court of Appeals without raising the point. The suggested defect, if it ever existed, has been waived by the Surety Company because:

(a) It consented to go to trial before the Master and Auditor without objection to the pleadings as they then stood. *Laber* v. *Cooper,* 7 Wall. 565, 19 L. Ed. 151 (1869); *Fretz* v. *Stover,* 22 Wall. 198, 22 L. Ed. 769, (1875); *Argentine Mining Co.* v. *Terrible Mining Co.,* 122 U. S. 478, 30 L. Ed. 1140, (1887); *Troxell* v. *Delaware L. & W. R. Co.,* 227 U. S. 434, 57 L. Ed. 586, (1913); *Adam* v. *Norris,* 103 U. S. 591, 26 L. Ed. 183, (1881); *Ankeny* v. *Clark,* 148 U. S. 345, 37 L. Ed. 105, (1893).

(b) Because it made no objection on grounds of relevance or surprise to the introduction of evidence to the effect that the bank examiners and directors saw and relied upon the bonds and believed in their genuineness. The only objection raised to such evidence was on general grounds of immateriality. *San Juan Light & Transit Co.* v. *Requena,* 224 U. S. 89, 56 L. Ed. 681, (1912). In that case, this Court said at page 97:

> "Effect must therefore be given to the well settled rule that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

See also *Grant Bros. Construction Co.* v. *U. S.,* 232 U. S. 647, 58 L. Ed. 776; *Hardin, Admr.,* v. *Boyd,* 113 U. S. 756, 28 L. Ed. 1141, (1885); *Snyder* v. *Rosenbaum,* 215 U. S. 261, 264, 54 L. Ed. 187, (1909); *Standard Oil Co.* v. *Brown,* 218 U. S. 78, 54 L. Ed. 931, (1910); *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, (1912); *McCandless* v. *Furlaud,* 296 U. S. 140, 80 L. Ed. 121, (1935).

(c) It failed to assert any variance between the pleadings and the findings of the Master. *New Orleans Etc. R. R. Co.* v. *Lindsay,* 4 Wall. 650, 18 L. Ed. 328, (1866); *Wasatch Mining Co.* v. *Crescent Mining Co.,* 148 U. S. 293, 37 L. Ed.

454, (1893); *Grayson* v. *Lynch*, 163 U. S. 468, 41 L. Ed. 230, (1896).

(d) It failed to argue the alleged deficiency in the pleadings before the Circuit Court of Appeals. *Grayson* v. *Lynch*, 163 U. S. 468; *Dean* v. *Davis*, 242 U. S. 438, 61 L. Ed. 419, (1917); *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 81 L. Ed. 33, (1936).

If the supposed deficiency consists of a failure to plead the estoppel which the Receiver claims arises to prevent the Surety Company from denying Cliff's authority, it is enough to say that under the statutes and rules of court governing the matter of pleadings in the District of Massachusetts, such an estoppel need not under the circumstances of these cases be pleaded. *Little Rock Water Works Co.* v. *Barrett*, 103 U. S. 516, 26 L. Ed. 523, (1881); *Jackson* v. *Virginia Hot Springs Co.*, 213 Fed. 969, (C. C. A. 4) (1914); *Brocklehurst & Potter Co.* v. *Marsh*, 225 Mass. 3, 113 N. E. 646, (1916); *Comstock* v. *Livingston*, 210 Mass. 581, 97 N. E. 106, (1912); *Pierce* v. *Loomis*, 224 Mass. 226, 112 N. E. 1027, (1916); *Com* v. *DiStasio*, 1937 Mass. Adv. Sh. 791, 797, 8 N. E. (2d) 923; *Pringle* v. *Storrow*, 9 F. (2d) 464 (D. C. Mass.) (1925). See also *Philadelphia W. & B. R. Co.* v. *Howard*, 13 How. 307, 335, 336, 14 L. Ed. 157, 169, (1851) In that case the Court said at page 335:

> "But if he has not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence, on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby."

See also *Joy* v. *Godchaux*, 35 F. (2d) 649, (C. C. A. 8) (1929), Cert. den. 281 U. S. 723; *Shelton* v. *So. Ry. Co.*, 255 F. 182 (D. C. Tenn.) (1918); *New York Life Ins. Co.* v. *Rees*, 19 F. (2d) 781, (C. C. A. 8, Mo.) (1927); *United States Fidelity & Guaranty Co.* v. *Wilson*, 41 F. (2d) 319, (C. C. A. Ark.) (1930); *Foye* v. *Patch*, 132 Mass. 105, 109.

Such an estoppel is not invoked as a weapon of attack. It is not a part of the Receiver's case which rests on the Sur-

ety Company's promise. *Mt. Vernon Trust Co.* v. *Bergoff*, 272 N. Y. 192 (1936) *supra*. It arises *as a matter of law* to prevent the Surety Company from asserting a certain type of defense to the Receiver's action. Indeed it is difficult to see how the estoppel could have been pleaded at any time before the full character of the Surety Company's defense had been disclosed by the testimony of its witness Cliff upon a trial of the facts.

B.

Notice of default given by the receiver complied with the terms of the bonds.

Neither of the courts below dealt with this question in their opinions.

Copies of the bonds and endorsements appear as exhibits to the Master's report as follows:—Cronin bond, Exhibit "A" (R. 92, 93); Cronin endorsement, Exhibit "C" (R. 96); Westchester bond, Exhibit "D" (R. 96, 97); Westchester endorsement, Exhibit "E" (R. 97, 98); Stone bond, Exhibit "F" (R. 98, 99); Robinson bond, Exhibit "G" (R. 99, 100). The findings and rulings of the Master respecting the matter of notice appear in the record at pages 73-81. The Master found as a fact that each of the several notes given by Cronin subsequent to the date of maturity of the original Cronin note was a "renewal" or an "extension" within the meaning of the Cronin bond (R. 48) and like findings were made with respect to the Stone transactions (R. 98, 99, 50, 51) and with respect to the Robinson transactions (R. 72). See *Kendall* v. *Equitable Life Assurance Society*, 171 Mass. 568, 573 (1898) to the effect that the question of whether a note or debt is paid by a subsequent note, or is renewed or extended thereby, is one of fact, depending on the intention of the parties and other circumstances surrounding the transaction. See also *Dodge* v. *Emerson*, 131 Mass. 467 (1881); *Cotton* v. *Atlas National Bank*, 145 Mass. 43, 45 (1887) to the effect that whenever

it appears that it will be for the benefit of the holder of a secured obligation that the original obligation should be kept alive, the acceptance of a new note will not discharge the original debt, since it will be presumed that the creditor did not intend to give up his security.

(1) The provisions as to notice of default in the several bonds did not constitute conditions precedent to liability on the part of the Surety Company.

A provision as to notice of default will not be construed as a condition precedent, unless the wording of the notice clause is specifically phrased in terms of condition. *New Amsterdam Casualty Co.* v. *United States Shipping Board*, 16 F. (2d) 847 (C. C. A. 4), (1927); *Coventry Mutual Live Stock Inc. Assn.* v. *Evans*, 102 Pa. St. 281 (1883); *Mason* v. *St. Paul Fire & Marine Ins. Co.*, 82 Minn. 336, 338 (1901); *Kahnweiler* v. *Phoenix Ins. Co.*, 97 Fed. 562 (D. C. Kan. 1893); *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wisc. 112 (1892); 3 Williston, Contracts (Rev. Ed.) sec. 665; 5 Joyce, Insurance (2d) Ed.), sec. 3282.

In the instant case the condition of each of the bonds appears in the second paragraph and the specific word "condition" is used. That paragraph contains no reference to notice of default. In each instance the subject of notice of default is dealt with in a separate paragraph (the third), which contains no words of condition (R. 92, 93, 96, 97, 98, 99, 100).

Likewise the several instruments given by Cliff to effect extensions of the bonds referred to as "Endorsements" did not contain any conditional language.

The Master ruled that in each instance the provisions as to notice were not conditions precedent.

(2) Even if the notice provisions were conditional, notice of default was given in each case within the time specified in the respective bonds.

(a) The Cronin Bond.

The Master ruled in effect that even if the provisions as to notice appearing in the Cronin bond and the endorsements thereto were to be construed as constituting conditions precedent, notice of default was given to the Surety Company in compliance with the terms of the instruments concerned (R. 76). The reasons upon which this ruling was grounded were fully set forth by the Master (R. 77, 78).

The Cronin bond was extended three times by successive instruments signed by Cliff called "endorsements" (R. 77). The final endorsement, dated November 2, 1931, extended the bond to secure the then existing indebtedness of Cronin to the Bank and extended the coverage of the guaranty until November 3, 1932, a period of one year. The only default possible with respect to such an obligation would be the failure of Cronin to pay the indebtedness in full on or before November 3, 1932. The receiver gave notice of default November 4, 1932, which was well within the five-day period specified in the endorsement.

(b) The Westchester Bond.

The Master ruled that the notice of default given with respect to the Westchester Discount Corporation bond complied with the provisions of the bond and the endorsements (extensions) given with respect thereto (R. 78). The Master fully sets forth the reasons upon which his ruling was based (R. 79).

The original Westchester bond was dated December 20, 1930, and obligated the Surety Company to pay the obligation of the Westchester Discount Corporation held by the Bank within thirty days after April 20, 1931. On April 20, 1931, an endorsement was delivered by Cliff extending the obligation of the bond to June 20, 1931, and on that date a second endorsement in terms identical to the first endorsement (except for dates) was given, extending the obligation to December 20, 1931. A copy of the bond appears as

Exhibit D (R. 96, 97) and a copy of the second endorsement at record, pages 97, 98 (For finding and explanation as to the terms of the first endorsement see record, page 50).

As the obligation of the Westchester Discount Corporation held by the bank had matured on April 20, 1931, and *was never renewed,* it is obvious that both endorsements were executed with the intention that they should secure the payment of the overdue obligation throughout the period specified in the respective endorsements (extensions). The debt had not been paid on December 20, 1931, and the Receiver so notified the Surety Company before the five-day period had elapsed (R. 79).

(c) The Stone Bond.

The Master made an alternative ruling to the effect that if he was in error with respect to the non-conditional character of the notice clause, then notice of default was not given to the Surety Company in accordance with the terms of the bond. There was no extension of the Stone bond by endorsement or otherwise. The bond is set forth at record, pages 98, 99.

It was dated June 2, 1931, and was conditioned upon payment by one Joseph Stone of an obligation of $52,000.00 within one year from that date. On June 2, 1932, Stone had not paid his indebtedness and the Receiver's notice was not given to the Surety Company until on or about June 30, 1932. The period of time referred to in the notice clause in the bond was ten days, but more than three months prior to the expiration of the term of the bond (namely on February 23, 1932), the Surety Company had brought its bills in equity against both the Bank and the Receiver seeking to cancel the Stone bond along with the other three bonds and denying all liability thereon. By the bringing of the suit to cancel the bond and the filing of a bill of complaint denying all liability thereon, the Surety Company dispensed with any formal proof which might have been required as a condition of its liability to

be sued. See *Royal Insurance Co.* v. *Martin,* 192 U. S. 149; 48 L. Ed. 385 (1904), in which case this Court said at page 162:

> "A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence."

(d) The Robinson Bond.

The Master made an alternative ruling to the effect that if he was in error with respect to the non-conditional character of the notice clause, then notice was not given with respect to this bond within the time specified therein (R. 80). The Master's reasoning with respect to this ruling is set forth in full in the record at pages 80, 81. The clause is quoted in full by the Master at page 80. Commenting upon it the Master said (R. 81):

> "This language in its entirety does . . . completely defy interpretation."

If this be true, the notice clause is a mere jumble of meaningless words which cannot be held to derogate from the promise of the Surety Company to pay the Robinson note or *any extension thereof* should Robinson fail to do so. If an attempt is to be made to judicially construe and give effect to this clause, it must be construed in accordance with the established rules governing the construction of written instruments, including the rule that language tainted with ambiguity is to be construed most strongly against the party who drew the instrument and the other rule, as stated in *Agricultural National Bank* v. *Brennan,* Mass. 1936 A. S. p. 1815, at 1817:

> "Where the language of the instrument is not clear beyond peradventure, an interpretation will commonly

> be adopted which will effectuate a reasonable and enforceable purpose to accomplish a practical and straightforward end."

The bond in question was executed by Cliff. It was obviously contemplated that the note given by Robinson to the Bank might be renewed or extended without relieving the Surety Company from obligation on the bond. Viewing the instrument as a commercial document and giving weight to the purpose for which it was given, the essence of the transaction appears to be expressed in the final clause of the instrument reading as follows:

> "the liability of the Surety with respect to any such extension or renewal, in no event to extend beyond date of July eighth, nineteen hundred thirty-two." (R. 80)

In spite of confusion and ambiguity in the early parts of the clause in question, this final provision is clear and explicit that the Surety Company's liability should extend to July 8, 1932, unless Robinson made payment before that date.

Such was Cliff's interpretation of the bond as stated in his letter to the Bank dated November 12, 1931, when specific inquiry was made by a director of the Bank (R. 129). There was no evidence that the Bank or the Receiver made demand for the payment of Robinson's renewal note when it matured December 9, 1931, or thereafter, so that even though there was no formal "*renewal*" of the note, there was an "*extension*" of the unpaid balance of Robinson's obligation which the bond was intended to secure, since the body of the instrument refers to the Robinson note or any "*extension thereof,* in whole or in part" and makes no reference to renewal. Inasmuch as Robinson's indebtedness continued unpaid until July 8, 1932, the bond, by its own terms, had continued in force up to that date, and for the further period of ten days which (if any meaning can be ascribed to the notice clause), the

instrument itself provided as days of grace for the giving of notice. Within that period, to-wit on July 10, 1932, the Receiver gave notice of default to the Surety Company (R. 81).

It is submitted, therefore, that even if the default clauses are to be construed as conditional in their operation, the condition has been met in each instance and the defense with respect to notice is without merit.

C.

The note-guaranty bond given in connection with the Bank's loan to Westchester Discount Corporation secures the obligation of the Westchester Discount Corporation actually delivered to and held by the bank.

Neither of the courts below dealt with this question in their opinions.

The findings of fact made by the Master may be summarized briefly as follows:

In December, 1930, Ragan asked Cliff to write a bond securing a note of Westchester Discount Corporation hereinafter referred to as Westchester in the amount of $40,000. On December 20, 1930, Cliff executed a bond in the name and on behalf of the Surety Company, which bond was also executed by Westchester as principal obligor. The bond is set out at R. p. 96. The bond is in the penal sum of $40,000 and is conditioned upon the payment of four notes of $10,000 each described as dated December 20, 1930, and maturing serially each month for the next four months.

The record is silent as to the date when the bond was actually delivered, but it may be fairly assumed that it was delivered to the Bank at the time when the note of Westchester, hereafter referred to, was delivered and a loan of $40,000 made by the Bank to Westchester. On or about December 23, 1930, Westchester gave a collateral form note to the Bank, duly executed, in the sum of $40,000, maturing four months from date, namely, on April 23, 1931 (R. 49).

This note was the only note of Westchester which the Bank ever held, and the loan represented by this note was the only transaction which Westchester ever had with the Bank.

Some time in April, 1931, Cliff executed in the name of the Surety Company and delivered to the Bank under date of April 20, 1931, a so-called "Endorsement" (See Ex. "E", R. 50, 97). This endorsement read as follows:

> "For value received, Note Guaranty Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000, in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20, 1931, is hereby extended for a period of two months from this date in an amount not to exceed $40,000, or such portion thereof as may remain unpaid on date of June 20th, 1931.
>
> "In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston shall notify the Home Office of this Company at No. 80 John Street, New York City within five days by registered mail, of such default.
>
> "Witness our hand this twentieth day of April A. D. nineteen hundred and thirty-one."

On or about June 20, 1931, a second "Endorsement" was executed by Cliff in the name of the Surety Company and delivered to the Bank. This endorsement read as follows:

> "For value received, Note Guaranty Bond issued in favor of the Continental National Bank of Boston and binding this Company to an obligation in the amount of $40,000, in connection with a series of notes of the Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental National Bank of Boston, the last note of said series maturing on date of April 20, 1931, and subsequently extended for a

period of two months until June 20th, 1931, is now further extended for a period of six months from this date in an amount not to exceed $40,000, or such portion thereof as may remain unpaid on date of December 20, 1931.

"In event of default on the part of the principal, said Westchester Discount Corporation of Mount Vernon, New York, the obligee, the said Continental National Bank of Boston and/or its successors and assigns, shall notify the Home Office of this Company at No. 80 John Street, New York City, within five days by registered mail, of such default.

"Witness our hand this twentieth day of June, A. D. nineteen hundred and thirty-one."

The Surety Company claims and the Master in his report included a so-called "ruling" to the effect that the bond in question did not secure the payment of the note actually given by Westchester, because the description of the obligation of Westchester which the bond purported to secure did not conform with the obligation actually given by Westchester to the Bank. A similar claim is made by the Surety Company with respect to the endorsements above set forth.

It is submitted that there is no merit in this contention and that the ruling of the Master in support thereof is erroneous.

The note-guaranty bond and the endorsements thereof are commercial instruments, and to determine their effect they must be construed and interpreted according to the rules of law governing such instruments.

The bond was executed and delivered in Massachusetts and the contract of suretyship or guaranty therein contained was executed within that commonwealth. Therefore, in this respect the law of Massachusetts should govern.

The rule of law governing this subject, as laid down by the Supreme Court of Massachusetts, was stated by Mr. Chief Justice Rugg in the case of *Agricultural National Bank* v. *Brennan*, Mass. 1936, A. S. 1815, at p. 1817:

> "The liability of a guarantor is to be ascertained from the terms of the written instrument by which the obligation is expressed, construed according to the usual rules of interpretation in the light of the subject matter, the well understood usages of business, the relations of the parties to each other and to the transaction, and all other material circumstances."

Substantially the same language was used by the same court in the case of *Zeo* v. *Loomis*, 246 Mass. 366 (1923), although in that case the same rule was held to be applicable to the construction of contracts of suretyship. See also *L. Littlejohn & Co. Inc.* v. *Handy*, 246 Mass. 370, 374 (1923); *Merrimac Chemical Co.* v. *Moore*, 279 Mass. 147 (1932).

In the *Agricultural Bank* case, *supra*, the court examined all of the circumstances surrounding the giving of the guaranty there under consideration, including the conversations between the guarantors and the party guaranteed. The purpose of the inquiry was to ascertain the actual subject matter of the written guaranty, as understood by the parties, since the terms of the instrument did not exactly conform with the facts relating to the indebtedness held by the Agricultural National Bank. The court was satisfied that the items of indebtedness held by the party guaranteed were in the minds of the parties as being the obligations covered by the guaranty contract. See also *Kennedy Bros. Inc.* v. *Bird*, 287 Mass. 477, 192 N. E. 73 (1934); *Talbot* v. *Rednalloh Co.*, 283 Mass. 225, 186 N. E. 273 (1933).

Applying these general principles of law to the facts in the cases at bar involving the Westchester bond and endorsements compels the conclusion that the Westchester bond was not a nullity because of the variance in the description of the details of the transaction. There can be no doubt but that an ambiguity existed, inasmuch as Westchester never gave, and so far as appears never intended to give, a series of four notes of $10,000 each maturing monthly as described in the schedule in the bond. An ex-

amination of the note actually given by Westchester under date of December 23, 1931 (R. 49), discloses the fact that it recited that the maker of the note had deposited as collateral four notes of a third party for $40,000. The existence of these four notes as collateral amply explains the clerical error in the bond.

The essential and controlling facts are that Ragan had asked Cliff to issue a note-guaranty bond to secure a $40,000 obligation of Westchester; that Westchester gave a note for $40,000; and that this note and the loan made thereon was the only transaction which Westchester ever had had or thereafter had with the Bank. There can be no real doubt as to the indebtedness which all parties to the transaction intended should be secured by the bond. The Master expressly found "that both Ragan and Cliff intended the bond to secure the Westchester note for $40,000" (R. 72).

The following facts are also significant:

(a) The original bond was signed by Westchester as the primary obligor.

(b) The Surety Company was not obliged to pay on default any of the notes referred to in the bond until the expiration of thirty days from the due date of the last maturing note, and that date was almost coincidental with the due date of the $40,000 note actually given by Westchester. Therefore, the only difference between the obligation assumed by the Surety Company according to a strict reading of the bond and the obligation to pay, on default, the single $40,000 note, is a matter of three days, involving the variance between a final due date of April 20th and of April 23rd.

(c) The first endorsement, given under date of April 20, 1931, recites the giving of a "note guaranty bond issued in favor of the Continental National Bank of Boston and binding this company to an obligation in the amount of $40,000 in connection with a series of notes of Westchester Discount Corporation of Mount Vernon, New York, given to the said Continental Na-

tional Bank of Boston the last note of said series maturing on date of April 20, 1931. . . ." If there could be any scintilla of doubt as to whether all parties concerned originally had in mind the same debt and obligation, such doubt must be completely dispelled by the delivery of this endorsement, the language of which imports a recognition of the existence, identity and binding effect of the obligation secured and of the guaranty bond covering the same.

(d) Again, on or about June 20, 1931, another extension endorsement was delivered, which recited in similar language not only the giving and the binding effect of the original bond, but referred to the first extension of April 20, 1931.

To hold that the contract of guaranty (if otherwise enforceable), falls because of a careless description respecting an inconsequential detail, would do violence to the established rule of interpretation governing such contracts under the laws of the forum in which it was made and was executed. Even if the original bond was defective, the endorsements cured the defect and deprived the Surety Company of the opportunity of attempting to elude liability on technical grounds of misdescription and pretended consequent misunderstanding.

D.

The action taken by the Receiver to enforce certain fidelity bonds issued to the Bank by Fidelity and Deposit Company of Maryland did not constitute an election of remedy which effected a discharge of the Surety Company's liability on the note-guaranty bonds involved in the instant cases.

Neither of the courts below dealt with this question in their opinions.

The Bank held two fidelity bonds (known as Bankers' Blanket Bonds) written by Fidelity and Deposit Company

of Maryland (hereinafter referred to as the "Fidelity Company"). The maximum liability of the Fidelity Company under these bonds was $200,000.00. The bonds insured the Bank against loss, as defined in the bonds, arising through dishonest and criminal acts of employees (R. 83).

The order of events is important. On February 23, 1932, the Surety Company filed the four bills in equity here before the court denying liability on the note-guaranty bonds alleging their fraudulent character, and seeking their cancellation (R. 82).

On April 28, 1932, the Receiver submitted a notice of loss to the Fidelity Company, followed on June 2, 1932, by a proof of loss (R. 82). The notice and proof of loss contained twenty-six items totaling $501,385.24 (R. 85). Among these items were estimated losses arising from the Cronin, Westchester, Stone and Robinson transactions amounting to $127,000.00 (R. 83, 84, 85). The notice and proof of loss were not public records, and were not addressed to the Surety Company, respondent herein. The Surety Company has not been harmed by them and has not changed its position in reliance upon them (R. 90).

The Receiver's actions at law against the Surety Company on the note-guaranty bonds herein concerned were not commenced until June 8, 1932, and August 11, 1932, respectively (R. 82).

Thereafter the Receiver commenced suit against the Fidelity Company on the blanket bonds by writ dated December 21, 1932 (R. 82). These bonds provided that suit to enforce the same must be commenced within one year from the date of the discovery of any loss for which indemnity was claimed under the blanket bonds (R. 89). On June 23, 1933, the Receiver amended his declaration in his suit against the Fidelity Company and filed a bill of particulars whereby he based his claims for indemnity against the Fidelity Company with respect to the Cronin, Westchester, Stone and Robinson transactions, upon the making by Ragan in each case of a "loan with intent to defraud

insured'' (R. 82, 86). The Receiver's action against the Fidelity Company was tried upon the pleadings as so amended.

In the instant cases the Surety Company has not established that the Fidelity Company was liable to the Receiver with reference to the four transactions in question (R. 88).

On October 10, 1934 (following twenty days of trial of the Fidelity Company suit) a settlement was arrived at under which the Fidelity Company paid the Receiver $100,000.00, the Receiver gave a release to the Fidelity Company, and an agreement was made between the parties, which declared that the Fidelity Company acquired no rights against the Surety Company under the four note-guaranty bonds involved in the instant cases, that the Receiver reserved to himself all rights with respect to such bonds and that no part of the settlement money paid by the Fidelity Company to the Receiver was paid for the acquisition by the Fidelity Company of any rights against the Surety Company. Judgment was entered in accordance with this agreement (R. 87, 88). About five months after the Fidelity Company suit had been disposed of, as above stated, the actions at law in the instant cases were referred to the Auditor (R. 26), and on the same day the equity cases were referred to the Master (R. 196).

The Master ruled that the position of the Fidelity Company with respect to the Cronin, Westchester, Stone and Robinson notes (and the note-guaranty bonds held to secure the same) was that of a sub-surety; that it was not a prerequisite to the right of the Receiver to recover against the Fidelity Company with respect to these transactions that he should first exhaust his remedies against the Surety Company upon the note-guaranty bonds; and that had the Receiver recovered against the Fidelity Company with respect to these note transactions, the latter would have been subrogated to the Receiver's rights with respect to the note-guaranty bonds (R. 89).

On these facts the Surety Company argued in the courts below that the Receiver's action with respect to the fidelity or blanket bonds constituted an election of remedy which discharged the Surety Company from obligation in the instant cases. The Master ruled that there was no election of remedy such as to constitute a defense to the Receiver's claims and supported this ruling by a discussion of the question of law involved (R. 88, 89, 90).

The facts presented in the instant cases do not permit the application of the principles of law involving election of remedy. It is not a situation where the Receiver as a wronged party, has the option of affirming or disaffirming a transaction or of accepting or repudiating a title and where such party definitely exercises such option. See *United States* v. *Oregon Lumber Company,* 260 U. S. 290, 67 L. Ed. 261 (1922); *Frisch* v. *Wells,* 200 Mass. 429, 86 N. E. 775 (1909); *Scarf* v. *Jardine,* 7 A. C. 345 (1882); *Washburn* v. *Great Western Insurance Co.,* 114 Mass. 175 (1873).

In the instant cases the Receiver had in his hands for enforcement two separate groups of contracts made in favor of the Bank. One of these groups consisted of the fidelity or blanket bonds which provided for indemnification against losses arising from the dishonesty of the Bank's officers or employees. The other group of contracts were the four note-guaranty bonds concerned in the instant cases, which guaranteed the payment of the Cronin, Westchester, Stone and Robinson notes.

The sole basis of any claim the Receiver might have had against the Fidelity Company with respect to these transactions was Ragan's fraudulent participation in the making of the loans. The sole basis of the Surety Company's liability on the bonds is its promise to pay the notes upon default by the makers thereof. The two are not concurrent and inconsistent, but are separate and wholly unrelated.

If the Receiver could have established in his suit against the Fidelity Company that the transactions entered into

by Ragan, whereby the Bank's money was paid out on the Cronin, Westchester, Stone and Robinson loans, constituted thefts from the Bank, he could have recovered on the fidelity or blanket bonds and the Fidelity Company would have become subrogated to the Bank's and the Receiver's rights in the notes and in the note-guaranty bonds securing the same. Thus it is plain that the claims asserted by the Receiver against the respective insurance companies were not in the same right and hence there could be no election of remedy with respect thereto. This point is fully discussed and elucidated in the case of *Grubnau* v. *Continental National Bank*, 279 Pa. 501, 124 Atl. 142 (1924). Had the Receiver been indemnified by the Fidelity Company for these losses and had he later recovered against the original borrowers or any of them or against the Surety Company as an obligor on the bonds securing the notes, he would have been obliged to account to the Fidelity Company for the proceeds of any such recovery.

Had the Surety Company promptly responded to the Receiver's demand upon the note-guaranty bonds, the latter could not have recovered damages against the Fidelity Company for these items, but this result would have followed because his trust would have suffered no loss from Ragan's fraud, and, there being no loss, the Receiver would not have been entitled to indemnity. The fact that under such circumstances the Receiver would not have recovered against the Fidelity Company would not have arisen because of any election of remedy on his part. It would not have been a case of election of inconsistent remedies, but rather a situation where there was no loss calling for indemnity, regardless of the honesty or dishonesty of Ragan's intentions at the time that he made the loans to the four borrowers in question.

If it could be held that the bringing of a suit or suits constituted a decisive election of remedy, then the election would have taken place when the Receiver commenced his suit against the Surety Company, which in each instance

preceded the commencing of suit against the Fidelity Company (R. 82). It was a mere incident that the suit against the Fidelity Company was tried first, and the record is clear that the Receiver had abandoned any attempt to hold the Fidelity Company with respect to the four transactions here concerned at the time when judgment was entered in his favor for an agreed amount covering other losses sustained by the Bank by Ragan's dishonesty (R. 87, 88). The Fidelity Company had persisted in its denial of liability as to the four transactions herein concerned and the Master found that liability on the part of the Fidelity Company with respect thereto had not been established (R. 88).

Whatever language the Receiver may have used in his dealings with the Fidelity Company to identify the transactions whereby the Bank was mulcted through the connivance of Ragan, Cronin, Westchester, Stone, Robinson and Cliff, the issue was finally joined and the case tried up to the point of settlement, upon the clear-cut theory that the Receiver was claiming *indemnity* for actual or prospective losses resulting from the making of dishonest loans by an officer of the Bank (R. 86). The losses with respect to which the Receiver made claim for *indemnity* from the Fidelity Company did not spring from the giving of the bonds. The bonds were incidents of the loan transactions which resulted in losses and merely performed the function of "camouflage" to cover up the losses.

The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or of judicial administration and rests upon equitable principles. See *United States* v. *Oregon Lumber Co.*, 260 U. S. 290 (including dissenting opinion at page 304); 67 L. Ed. 261, 272 (1922).

In the case of *Friederichsen* v. *Renard*, 247 U. S. 207, 213, 62 L. Ed. 1075 (1918) this court said:

> "At best this doctrine of election of remedies is a harsh and now largely obsolete rule, the scope of which should not be extended."

It would be a distortion of the equitable principles upon which the law of election of remedies is founded (and which are closely akin to the principles governing the law of estoppel) if a party, having two separate rights grounded on contracts made by two separate promissors for separate considerations, should lose his rights against one promissor by pursuing the other promissor when there was no privity of contract or interest between the two promissors and the circumstances surrounding the making of the separate contracts were wholly unrelated. Such is the situation in the instant cases, with the added factor that to protect any possible rights the Receiver might have had against the Fidelity Company respecting these four note transactions, he had to bring suit within one year from the discovery of Ragan's part in making the four loans (R. 89). See *Fitchburg Savings Bank* v. *Massachusetts Bonding & Ins. Co.*, 274 Mass. 135, 174 N. E. 324 (1931).

The Surety Company has not attempted to show that it was in any way prejudiced by the Receiver's pursuing both possible remedies. In pursuing them the Receiver has not repudiated any title or disaffirmed any transaction. From the beginning the Receiver held consistently to the position that regardless of Cliff's part in the machinations of Ragan, the Surety Company was liable on the promise contained in the note-guaranty bonds.

The suggestion made by counsel for the Surety Company that the principles of election of remedies are applicable because the Surety Company had some sort of a contract of reinsurance with the Fidelity Company is without merit, being wholly immaterial, as the Master ruled. Counsel for the Surety Company do not attempt to claim that the Surety Company paid any portion of the loss actually paid by the Fidelity Company to the Receiver under the settlement above referred to. Although the instant cases went to trial on the facts more than five months after the suit against the Fidelity Company had been completely disposed of (R. 82, 83) it did not appear that the Fidelity Company had ever asserted any claim that the making of the settlement

imposed liability on the Surety Company under its reinsurance contract.

It is submitted, therefore, that the suggested defense of election of remedy is without merit.

CONCLUSION.

The Receiver, both in his actions at law and in the counterclaims set up in his answers to the bills in equity, seeks to compel the Surety Company to honor the promises contained in the note-guaranty bonds. The Surety Company's defenses (if we may adopt the military metaphor) consist of four lines "arranged in depth".

The first line is based upon the assertion that Ragan (the Bank's president) assured Cliff (the Surety Company's agent) that the bonds would not be enforced, which assurances were supported by written releases executed by Ragan in the name of the Bank. This line of defense is rendered untenable by the overwhelming weight of judicial authority which holds that such secret assurances, agreements and releases do not bind the Receiver of a defunct banking corporation when they relate to promissory instruments and obligations given to the bank with the intent that they shall have the appearance of sound and enforceable obligations and are relied upon as such by the bank examiners with consequent loss to the depositors and other creditors.

The Surety Company's second line of defense rests upon the theory that Cliff violated the secret instructions given him by his principal respecting his authority to execute instruments such as those which are involved in the instant cases. But this defense is disposed of by the well-established rule of law which holds that the Surety Company is estopped to deny Cliff's authority in the premises, because it had armed Cliff with full indicia of authority to execute just such instruments as these note-guaranty bonds by furnishing him with a written power of attorney which on its face gave him such authority and ratified and adopted all

that Cliff might do within the scope of the written power. The Surety Company fortified this grant of power and ratification by supplying Cliff with multi-originals of the power, duly certified and authenticated by the chief executive officers of the Surety Company with the intention that he should use them, just as he did in the instant cases, as evidence of his unlimited power and of his principal's ratification of all that he might do pursuant thereto.

The third line of defense rests upon the theory that because Ragan knew that Cliff was acting in fraud of his principal and in violation of his secret instructions, his knowledge is to be imputed to the Bank and such imputation defeats the Receiver's right of recovery, in that the Receiver can stand no better than the Bank, and recovery would have been denied to the Bank itself, as a solvent going concern, because of this imputation. But the situation in the instant cases is not one which calls for or permits the application of the legal fiction of imputation of knowledge. Ragan's knowledge, even if imputable to the proprietors of the Bank who selected him, is not to be imputed to the public officials (the Comptroller of the Currency and the bank examiners) who, in the case of a national banking corporation, are the representatives of the depositors and creditors of the bank. The fiction of imputation of knowledge is an invention of the law made for the purpose of placing a loss or injury where it equitably belongs. But in the instant cases neither the depositors and creditors nor the public officials designated by law to represent and protect their interests, were responsible for the selection of Ragan nor could they exercise any control over his actions until such time as the abuse of his position as a bank official was discovered, whereupon the protective provisions of the national banking statutes could be and were invoked by the Comptroller in aid of the depositors and creditors. To invoke the fiction of imputation and to cause it to strike down the protective arm of the Comptroller, would result in placing the loss resulting from the misconduct of Ragan and Cliff upon the innocent depositors and

creditors, instead of upon the Surety Company, which had made the fraud possible by reason of the manner in which it had seen fit to conduct its business, involving the giving to Cliff of an instrument carrying unlimited authority and unrestricted ratification. If applied here the fiction would bring about an inequitable result, which is the exact reverse of the purpose for which legal fictions have been created.

The fourth line of defense consists of four disconnected and unrelated positions, namely the alleged defect in the pleadings, suggested by the Circuit Court of Appeals for the First Circuit; the alleged deficiency with respect to notice of default by the principal obligors on the bonds; the alleged variance between the Westchester Discount Corporation note and the description thereof in the note-guaranty bond given to secure the same; and the alleged fatal election of remedy consisting of the prosecution by the Receiver of his rights of action under the fidelity bonds issued by Fidelity and Deposit Company of Maryland. Further comment on these points is not necessary, as they have been fully discussed above and shown to be without substance or merit.

It is submitted, therefore, that the protection of the national banking system, the establishment of uniformity throughout the nation with respect to the rules of law applicable to public banking institutions, and the ends of justice in the instant cases, all demand that relief be granted to the Receiver in aid of the depositors and other creditors of the Bank, and that the orders and decrees of the Circuit Court of Appeals for the First Circuit be reversed.

Respectfully submitted,

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APPENDIX.

Title 12 U. S. C., sec. 1:

"There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury."

Title 12 U. S. C., sec. 9:

"The Comptroller of the Currency is authorized to employ such additional examiners, clerks, and other employees as he deems necessary to carry out the provisions of chapter 9 and to assign to duty in the office of his bureau in Washington such examiners and assistant examiners as he shall deem necessary to assist in the performance of the work of that bureau."

Title 12 U. S. C., sec. 14:

"The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

* * * * * * *

"Third. Any amendment to the laws relative to banking by which the system may be approved, and the security of the holders of its notes and other creditors may be increased."

Title 12 U. S. C., sec. 27:

"If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate,

under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

Title 12 U. S. C., sec. 55:

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such associations, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 192 of this title. *And provided,* That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

Title 12 U. S. C., sec. 161:

"Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president, or of the cashier, or of a vice president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition.

* * * * * * * *"

Title 12 U. S. C., sec. 191:

"Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a

certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192."

Title 12 U. S. C., sec. 194:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Title 12 U. S. C., sec. 481:

"The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank other than those expressly excepted by section 330 of this title, at least twice in each calendar year and oftener if considered necessary: . . ."

Title 28 U. S. C., sec. 777:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or

want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al.*,
Petitioners,

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK,
Respondent.

(And Six Other Actions Consolidated Therewith)

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

A.

DISTINCTIONS TO BE OBSERVED IN CONNECTION WITH CONTENTION OF RESPONDENT THAT RAGAN'S KNOWLEDGE MUST BE IMPUTED TO HIS BANK.

Respondent, in his brief starting at page 18, contends, in line with the position taken by the court below, that the knowledge which Ragan had concerning the irregularities in connection with the issuing of the bonds sued upon by

the receiver, must be imputed to his bank with the consequence that the bank would thereby be precluded from enforcing the bonds and consequently the receiver would have no greater rights than the bank.

Apparently the principal decision of this court relied upon by respondent is *Curtis, Collins and Holbrook v. United States*, 262 U. S. 215. In our opinion the case is clearly distinguishable from the instant case. In that case Holbrook, Curtis and Collins, prior to the formation of the corporation,—Curtis, Collins and Holbrook Company,—were engaged in a joint adventure for the purpose of acquiring, on behalf of all of them, certain government lands. Curtis and Collins put up the money and Holbrook was to receive a commission for acquiring the lands and in addition a stock interest in the corporation which was to be formed for the purpose of taking over the title to the lands. This court held that the frauds perpetrated upon the Federal government in the acquisition of the land in question, having come to the attention of Holbrook as the agent of Curtis and Collins, notice of that fraud must be imputed to Curtis and Collins and that title to the land passed subject to the defect in title arising by reason of the fraud.

Emphasis was placed by the court below, in the instant case, as well as by respondent in his brief, upon the point that this court held that the joint adventurers in obtaining the fruits of the adventure must be charged with the knowledge of the agent through whom the fruits came, particularly in view of the fact that Holbrook was the sole agent representing his associates Curtis and Collins.

We cannot, of course, quarrel with the conclusion reached in the Curtis, Collins case, but we do not believe that it properly applies to the instant case.

It will be borne in mind that in the instant case Ragan, as an officer of the bank, was not engaged in *acquiring property for the bank*, but on the contrary was engaged in *misappropriating* the property of the bank and was, in effect,

borrowing money from the bank for the benefit of himself and his associates. The receiver, in the instant case, is merely seeking to recover the funds of the bank which were misappropriated by Ragan and his associates. While it is true that the loans were not obtained by Ragan in his own name, nevertheless it is quite clear from the Findings of the Master that the loans were for his benefit either directly, as in the case of the Westchester Discount Corporation item, or indirectly in the other cases for the purpose of preventing the bank examiners from discovering the true condition of the bank and thereby bringing trouble upon Ragan and his associates.

The notes given as formal evidence of the loans were guaranteed by the bonds issued by the surety company through their agent Cliff. Cliff participated with full knowledge in each of the transactions and the position of the surety company in the matter, through Cliff, was analogous to that of a guarantor or endorser upon the notes. The bonds, in mechanically fulfilling this function, must be considered an integral part of the notes which they secured. It is one thing to participate in a joint adventure for the purpose of acquisition of property and to take over title to that property as a result of that joint adventure, subject to defects in the title of which the joint adventurers are to be on notice actually or constructively. Necessarily the property in such case is taken subject to the known defects in the title. However, it cannot be said in the instant case that the bank was engaged in a joint adventure with Ragan and his associates in acquiring property but, as above indicated, Ragan and his associates were in effect dealing at arms length with the bank and were misappropriating the funds of the bank. Hence the Receiver in proceeding against the Surety as a participant, is only trying the *regain the dissipated property of the bank.*

If it should be assumed, for the purpose of discussion, that Ragan had acted in good faith, and that the collusion existed solely between the formal borrowers, Cronin, West-

chester, Stone and Robinson on the one hand, and Cliff on the other, there would seem to be no doubt whatsoever that inasmuch as neither the bank nor Ragan would have had notice of the collusion, and of the lack of authority of Cliff, full recovery could have been made by the bank, and the surety company would have been estopped from denying Cliff's authority. The fact is that in the instant case the bank *did not have actual notice* and it can be charged with notice only by indulging in a fiction that Ragan must be presumed to have disclosed his knowledge to the officers and directors of the bank under the doctrine that it is presumed an agent will disclose all relevant facts to his principal in connection with a pending transaction wherein he is acting for his principal. It is quite clear from the Findings of the Master in the instant case not only that Ragan *did not* disclose the situation to the officers and directors of his bank, but on the contrary actively concealed the same to serve his own purposes. In that respect the instant case is clearly within the reasoning set forth in *American National Bank* v. *Miller*, 229 U. S. 517, 522, wherein this court said that the usual presumption of notice by the agent to his principal does not apply where the agent is engaged in defrauding his principal and it is to his interest to conceal the fact from his principal. (See discussion our main brief pages 21-23).

Adverting to the distinction above suggested between a situation where an agent is engaged in *acquiring property on behalf of his principal*, as distinguished from a situation where the agent is engaged in *misappropriating or acquiring property from his principal*, it must be clear that while it is sound doctrine to say that a principal, in taking over property acquired for him by his agent, takes that benefit or property subject to defects of title or otherwise, certainly there is no basis for that doctrine where the principal is merely endeavoring to regain property of the principal which has been misappropriated by his agent.

Re-stating the distinction,—had Ragan been engaged in good faith in the proper banking function of making loans for the benefit of and on behalf of the bank, to customers of the bank, or others, there would be no doubt that defects of title affecting the paper discounted or the collateral securing the same, either brought to the attention of Ragan so as to constitute actual notice or such as reasonably to require investigation by him so as to constitute constructive notice to him,—would, under the general rule, be imputed to his principal, the bank, and the bank would thus take the paper, as an asset, as affected by the defects therein existing. However, where, as in the instant case, Ragan was not making a loan for the bank and acquiring a merchantable asset for it in the customary way, but was in effect either borrowing or misappropriating the funds of the bank, he was necessarily acting adversely to the bank and was dealing with it at arms length and was illegally attempting to act both on behalf of the bank and against the bank, and in such case the fiction of imputation of notice cannot in reason and good conscience apply. This distinction was undoubtedly in mind in the Massachusetts case of *Innerarity, et al.* v. *Merchants National Bank,* 139 Mass. 332, where Burgess, a director in a bank, borrowed money from the bank and pledged as collateral security certain bills of lading representing property entrusted to him in his private capacity as a commission agent. The court pointed out in that case that Burgess could not legally act on behalf of the bank as a director in approving the loan and at the same time act in his private capacity in borrowing from the bank, and in that connection, in quoting from the case of *Washington Bank* v. *Lewis,* 22 Pick. 24, the court said:

> " 'Whatever a director or other agent of the bank,' says the court, 'may do within the scope of his authority, would bind the bank so as to make it responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director, nor could he with any propriety so act. He was the party with whom the bank con-

tracted in discounting the note, and to whom the money was paid.'

"The proposition that a director of a corporation, *acting avowedly for himself or on behalf of another, with whom he is interested* in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority." (Italics inserted)

The Innerarity case was cited, and quoted with approval in this connection, by this court in *American Surety Company* v. *Pauly* (No. 1), 170 U. S. 133, 157.

This court again referred to the foregoing distinction in *American Surety Company* v. *Pauly, supra,* on page 158, in discussing the case of *Terrill* v. *Branch Bank of Mobile,* 12 Ala. 502, 507, where the director of a bank borrowed money from the bank upon the note of a third party which had been entrusted to him for an entirely different purpose. The bank sued the maker of the note, who contended by way of defense that the bank was charged of noticed of the director's breach of trust. This court quoted with approval from the Terrill case and said:

"The Supreme Court of Alabama said: 'It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, *he was in reality the representative of his own interest. Pro re nata, his powers as a director were suspended*—he was contracting with the bank through his associates in the directory—he was borrowing, not lending its money—though a member of the board and present, too, it cannot be supposed that he cooperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, *it cannot be presumed that he made any disclosure which would prejudice his application for a loan.*'" (Italics inserted)

Also see *Maryland Casualty Company* v. *Tulsa Industrial Loan and Investment Company,* 83 Fed. (2d) 14.

It is submitted that under the foregoing circumstances the knowledge of Ragan could not properly be imputed to his bank and that the bank would not, even if it were a going concern, be precluded from maintaining an action upon the bonds. It follows that the receiver could likewise maintain the action.

B.

THE RECOVERY UPON THE BONDS, AS AWARDED BY THE MASTER, AND THE APPLICATION OF THE DOCTRINE OF ESTOPPEL IN PAIS, ARE NOT PRECLUDED BY THE PLEADINGS AND THE ISSUES RAISED THEREON.

Respondent, in the discussion in his brief, pages 59-68,—contends that the Receiver could not recover under the theory adopted by the Master, based upon the application of the doctrine of estoppel, and asserts in that connection that the pleadings, as filed by the Receiver, precludes such relief (Respondent's brief, pages 59-60) in that the Receiver does not "represent" the creditors in such a way as to enable him to enforce damages resulting from deceit practiced indirectly upon the creditors. (Respondent's brief, pages 61 *et seq.*) Respondent has thus adopted the position taken by the court below to the effect that:

> "If creditors have certain rights personal to them, the Receiver can not enforce such rights. Michelsen, et al., v. Penney, 10 Fed. Supp. 537, 539, 540." (R., p. 286)

and again, the court below said:

> "As to whether the Receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings." (R. 288)

It seems to us that two *entirely different classes of rights* are *here confused*,—first, the right which the Receiver has,

as the statutory representative of the creditors, to enforce and liquidate assets of the receivership, and second, personal rights which one or more creditors *may* have *individually,* based upon fraud or deceit directly practiced upon them by an officer of the bank.

The case of *Michelsen* v. *Penney, supra,* referred to by the court below in that connection (R., p. 286) and also relied upon in the same connection by Respondent (Respondent's brief, p. 68) clearly demonstrates the distinction between the two classes of rights and at the same time, as we see it, supports the position of petitioner.

In the *Michelsen* v. *Penney case,* the plaintiff depositors relied, in the one bill in equity, upon both of the foregoing types of action as the basis for recovery; that is to say, they sought to recover upon (1) the alleged misconduct of the defendant director for negligence and mismanagement in connection with conducting the affairs of the bank, and also (2) for damages growing out of false representations made to them and to other depositors as to the solvency of the bank, on the theory that a deceit had thereby been practiced upon them.

As to the first type of action, the court held that the Receiver was the proper party to prosecute, inasmuch as such action would be for the purpose of recovering assets of the bank or damages for dissipation of assets of the bank and it was the function of the Receiver to take such action. As to the second type of action, the court properly held that the deceit practiced upon the individual depositor or creditor gave rise to a cause of action *personal* to him and that he alone could bring the suit.

Applying the foregoing distinction to the instant case, it is clear from the pleadings that the Receiver, in bringing suit upon the bonds, is seeking only to liquidate an asset of the bank. That the Receiver is the one properly to perform that function is clearly indicated by the provisions of Section 5234 R. S. (U. S. C., title 12, section 192, appendix, p. 14), wherein the Receiver of a national bank is required,

under the direction of the comptroller, to take possession of the books, records, and assets of every description of the bank, and to collect all debts, dues, and claims belonging to it. The Receiver's status and functions in this connection have been discussed in many cases, among the earliest of which is *Kennedy* v. *Gibson,* 8 Wall., 498, where this court said:

> "Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. *The receiver is the statutory assignee of the association, and is the proper party to institute all suits;* they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit." (Italics inserted)

Also see discussion in this connection, Petitioner's main brief, pp. 29-31.

It would seem to be equally clear that *the Receiver is not seeking in the instant case to enforce any personal right which the individual creditors may have* for fraud or deceit practiced upon the depositors. The confusion of thought in this connection indicated in the opinion of the court below and in Respondent's brief seems to be engendered by the fact that the Master considered that the deceit practiced by Cliff, the agent of the Respondent surety company, and Ragan, the president of the bank,—upon the bank examiners, the comptroller, and indirectly upon the depositors and creditors, *constitute a basis of estoppel in pais* whereby the respondent surety company would not be permitted *to deny the authority of its agent Cliff* in the execution of the guaranty bonds in question. In other words, the fraud and deceit referred to by the Master and fully borne out by the evidence, as practiced by Cliff and Ragan, *did not constitute the basis of recovery as awarded*

by the Master. The recovery was upon the bonds, as assets of the receivership; the fraud and deceit was relied upon to prevent or preclude the respondent surety company from *impairing those assets* by denying the authority of their agent, Cliff, to execute the bonds. Hence, it was quite consistent, when viewed in this light, for the Master to hold that in this respect the Receiver represented the creditors, for the reason that the Receiver does represent the creditors in liquidating the assets of the receivership, and the Receiver was thus engaged when he was seeking to recover upon the bonds and to prevent the surety company from escaping its liability upon the bonds. The following extract from the Master's Report in that connection clearly supports this position (R. 65):

> "4. I rule that the bonds and "endorsements" in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors."
>
> "In the first place it seems perfectly clear that if the Surety Company, by its duly authorized principal officers, had given these bonds for the purpose of deceiving the national bank examiners and creditors, the receiver could recover upon the bonds, regardless of absence of premium and of the existence of an agreement that the bonds were not to be enforceable obligations. *The foreseeable reliance upon these bonds of bank examiners and creditors would estop the Surety Company to deny the representations of enforceability explicit* in the terms of the instruments. *The cases establish that the receiver* as the representative of creditors *may assert the estoppel in pais thus arising."* (Italics inserted)

The cases cited by petitioner in his main brief in the discussion at pages 35-48,—are presented as supporting, by analogy, the foregoing position of the Master.

MATTER CONSTITUTING BASIS OF ESTOPPEL IN PAIS WAS NOT REQUIRED TO BE ANTICIPATED BY THE RECEIVER'S PLEADINGS.

Respondent Surety Company filed bill in equity against the bank and against the Receiver to have the bonds canceled upon the grounds that they were executed by their agent Cliff without consideration, without authority, and without its knowledge or consent, etc. (Typical Bill, R. 235.) The Receiver filed answer to said bills denying the grounds for cancellation and also affirmatively setting up the validity and effectiveness of the bonds and prayed that the court determine the amount due the Receiver under said bonds, coupled with the customary prayer for such further relief as the court might find mete and just. (R. 252)

The Receiver also filed suits at law declaring upon the bonds as assets of the receivership, asserting that they were in full force and effect (Typical Declaration, R. p. 4), to which the Surety Company filed its answer denying liability of the bonds, and asserted by way of defense, substantially the same grounds upon which it had sought cancellation of the bonds in its bills in equity. (R. 21)

All of the suits were consolidated for trial, and the situation in that respect is thus stated by the Master (R. 43):

> "These seven cases raise the question whether the Standard Surety and Casualty Company of New York (hereinafter called the Surety Company) is liable to the receiver of the Boston-Continental National Bank upon four bonds written in the name of the Surety Company by its attorney-in-fact, Percy G. Cliff. The bonds purported to guarantee payment respectively of a note of $20,000 made by Arthur D. Cronin, a note of $40,000 made by Westchester Discount Corporation, a note of $52,000 made by Joseph Stone and a note of $20,000 made by Gordon A. Robinson. In the four equity cases the Surety Company *seeks to have the bonds cancelled; the receiver counterclaims upon the bonds.* The three law cases are actions by the receiver upon the Westchester, Stone and Robinson bonds.

Amendments of the pleadings have made the issues raised in the law and equity cases identical."

In the final analysis, therefore, the Receiver, in seeking to recover upon bonds, which in every respect appeared to be regular, was met by the defenses of lack of consideration, lack of authority, etc., so far as the face of the pleadings and issues disclosed. When the evidence adduced, as primarily brought out by Respondent's witness, Cliff, disclosed the circumstances under which the bonds were issued, and the surety company sought to rely upon this evidence in support of its contentions of lack of consideration, lack of authority to issue the bonds, etc., the Receiver was entitled to assert, and the Master was entitled to support, the doctrine of estoppel in pais against the surety company. It is obvious therefore that there was no occasion nor opportunity for the Receiver to set these matters up in his pleadings, inasmuch as they necessarily resulted from the evidence adduced in the trial of the case in connection with the defense asserted by the surety company. It is thoroughly settled that matter by way of estoppel in pais may be relied upon under such circumstances to defeat the defense asserted. See, as particularly in point in that connection, the cases cited in our main brief (page 70) of:

Philadelphia W. & B. R. Co. v. *Howard*, 13 How. 307, 335, 336, 14 L. Ed. 157, 169 (1851).

Joy v. *Godchaux*, 35 F. (2d) 649 (C. C. A. 8) (1929). Cert. den. 281 U. S. 723.

Shelton v. *So. Ry. Co.*, 255 F. 182 (D. C. Tenn.) (1918).

United States Fidelity & Guaranty Co. v. *Wilson*, 41 F. (2d) 319 (C. C. A. Ark.) (1930).

The other cases therein cited refer primarily to the general proposition that a plaintiff is not required to anticipate matters of defense.

Respectfully submitted,

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APPENDIX.

Section 5234, R. S. (U. S. C., title 12, section 192):

"Sec. 192. Default in payment of circulating notes.

* * * * * * *

"Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, ET AL.,
Petitioners,
v.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK,
Respondent,

(AND SIX OTHER ACTIONS CONSOLIDATED THEREWITH).

BRIEF FOR STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, RESPONDENT.

CORRECTIVE AND SUPPLEMENTAL STATEMENT OF THE CASE.

Facts.

Contrary to the statement on page 2 of the petition, the four so-called "note guaranty bonds" were *not* "executed by the Surety Company," but were signed in its name without authority, contrary to its instructions (R. 46), and without its knowledge, by its agent Cliff, at the request of Ragan, the president of the Bank, who knew (R. 47) of Cliff's lack of authority, who knew the Surety Company was ignorant of the bonds, and who assured Cliff that they would be used only to satisfy the bank examiner

and would then be returned to Cliff. The Bank, in obtaining the bonds, acted solely through Ragan (R. 53), who, as part of the same transaction in each case, gave Cliff releases running from the Bank to the Surety Company (R. 47, 50, 52). There was no negligence on the part of the Surety Company (R. 54).

Pleadings.

In the three actions at law each declaration was on the bond in question (R. 4, 152, 166). The defendant's answers in the actions at law consisted of general denials and the further answer, in each case, that the bonds were executed by Cliff without authority from the defendant, without consideration, and upon the understanding between Cliff and the Bank that they were not binding obligations of the defendant and would, after a short time, be returned to Cliff, and that the Bank had given releases (R. 21, 22, 155, 156, 168, 169). In none of the pleadings in the actions at law were there any allegations of reliance on the bonds by the bank examiners or by creditors or depositors of the Bank, or of injury to any creditor or depositor.

In the four suits in equity, brought by the Surety Company for cancellation of the bonds, each bill of complaint alleges in substance the same matter as that set up in the defendant's answers in the actions at law, as above described (R. 179, 211, 235, 258). By amendment in each case there are further allegations of an election of remedies by the receiver (R. 198, 232, 254, 276). The answers in the equity suits are the joint answers of the Bank and of the receiver, and contain no affirmative allegations besides denial of Ragan's authority to give Cliff releases by the Bank, and allegations in each case that the Surety Company is liable on the bond according to its terms (R. 194, 229, 252, 274).

There is no allegation in any of the pleadings in the suits in equity of reliance on the bonds by the bank examiners or by creditors or depositors of the Bank, or of injury to any creditor or depositor (R. 194, 229, 252, 274).

The Surety Company objected to the evidence offered by the receiver of reliance on the bonds by the bank examiner, and of reliance by and injury to creditors and depositors of the Bank (R. 90). The master and auditor in his report says:

> "It may safely be said that no possible objection on grounds of materiality have been waived" (R. 90).

The Circuit Court of Appeals, in denying the petition for rehearing, finds (R. 292, 293) that—

> "The plaintiffs (Bank and receiver) in their brief filed in this court say: 'Amendment of the pleadings have made the issues raised in the three law actions identical with the issues raised in the equity cases based on the same bonds.' * * *
>
> "No issue is raised in the plaintiff's brief except as to the validity of the bonds. The obligations of the Surety Company based on the depositors of the Bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned. * * *"

Summary of Argument.

The questions sought to be raised by the petition, and by the petitioners' brief, cannot properly be raised on this record. Both petition and petitioners' brief ignore the procedural point upon which the decision of the Circuit Court of Appeals is based, namely, that the pleadings do not permit the claim here relied upon by the petitioners.

As the petitioners are limited by the pleadings, the case is, at best for the petitioners, well within the limits of the undisputed law established by decisions of this honorable Court.

Even if the petitioners were not so limited, there is no conflict of decisions on the facts found in this case such as to justify the petition. In none of the cases cited by the petitioners did a court allow recovery by a receiver against an innocent person, where the bank itself could not recover.

Argument.

I.

THE QUESTION OF LAW WHICH THE PETITIONERS URGE TO BE OF SUCH PUBLIC IMPORTANCE AS TO WARRANT A REVIEW BY THIS HONORABLE COURT IS NOT RAISED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals based its decision upon the failure of the receiver to allege the facts upon which his present contention is based. In its opinion (R. 281), the court below says:

> (R. 285:) "Here is the principal issue in the case. The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration * * *.
>
> * * * * * * * *
>
> (R. 286:) "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of

the Bank. In such an action he stands no better than the Bank itself. * * *

(R. 287:) "If, therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found that the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety * * *. *There is no allegation in the declarations at law that the receiver based his grounds of action on any alleged deception of, or injury to, any creditors of the Bank, or that any creditors were directly or indirectly injured by the giving of the surety bonds, nor does the receiver allege that he is suing on account of any creditors so injured.* [Italics supplied.]

"The grounds of the action at law are that the bonds alleged to have been issued by Cliff to secure the notes of the several parties referred to in the declarations were between the Surety Company [R. 288] and the Bank, and were valid, binding obligations.

* * * * * * * *

"We think the auditor and master in his report went outside the issue raised by the pleadings. * * * "

* * * * * * * *

(R. 288:) "The questions of whether the receiver, having brought an action against the Fidelity & Deposit Company to recover on a bond issued to indemnify the Bank against the unlawful acts of Ragan in taking these bonds, the Surety Company can defend on the ground of an election of remedies, see *Minneapolis National Bank* v. *Liberty National Bank,* 72 Fed. (2d) 434, 436, or for lack of notice of default in the

payment of the notes, we do not decide, since *there can be no recovery by the receiver on the pleadings in the case.*" (Italics supplied.)

The petitioners here petitioned the Circuit Court of Appeals for a rehearing on the ground that the prayers of the petitioners in their counterclaim to the bills in equity were general (R. 289, 290). The court below denied the petition for rehearing, saying in its opinion (R. 291, 292, 293):

> "The plaintiffs cite their prayer in their petition for rehearing, but a prayer must follow the allegations in the complaint or counterclaim.
>
> • • • • • • • •
>
> "The plaintiffs in their brief filed in this Court say: 'Amendment of the pleadings have made the issues raised in the three law actions identical with the issues raised in the equity cases based on the same bonds.'
>
> • • • • • • • •
>
> "The Master evidently so understood the issue. • • •
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> "The District Court so understood the issues. • • •
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> • • • • • • • •
>
> "No issue is raised in the plaintiffs' brief except as to the validity of the bonds. *The obligation of the Surety Company based on the depositors of the Bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiffs' counterclaim in the equity suits.*" (Italics supplied.)

The petitioners here seek to argue the question whether a receiver may not recover in the right of creditors. This question was not raised by the pleadings, and for that reason was not decided by the Circuit Court of Appeals.

> "As to whether the receiver by proper allegations of an injury to creditors, if based on facts, could have recovered in an action brought for the benefit of such creditor or creditors, is not raised by the pleadings" (R. 288).

The only ruling made by the Circuit Court of Appeals which touches the point argued by the petitioners was that the receiver could not rely upon a claim which he did not make in his pleadings. This ruling, even if it could be questioned on petition for certiorari, is not attacked, or even mentioned, either in the petition itself, or in the petitioners' brief.

The ruling is sound. It is unquestioned law. There is no conflict of opinion upon the principle.

> "The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the Court cannot judicially act upon them as a ground for its decision; * * *"
>
> Story, J., in *Harrison et al.* v. *Nixon,* 9 Pet. 483, 503.
>
> *Putnam* v. *Day,* 22 Wall. 60.
>
> *Pickard* v. *Clancy,* 275 Mass. 89.
>
> *Duane* v. *Merchants Legal Stamp Co.,* 227 Mass. 462, 468.

The ruling of the court below on this procedural point, not having been questioned in the petition for certiorari, would not be open to the petitioners on review.

> *Clark* v. *Willard et al.,* 294 U.S. 211.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS RESTS UPON FIRMLY ESTABLISHED PRINCIPLES OF LAW ABOUT WHICH THERE IS NO CONFLICT IN THE FEDERAL COURTS.

The petitioners in their petition (pp. 4, 5), and in their brief (pp. 12 ff.), treat the decision of the Circuit Court of Appeals as though it were a broad declaration that in *no* case could a receiver of a national bank have rights which the bank did not have. No such broad ruling is involved in the decision of the court below. Its decision is based upon the case before it, as limited by the pleadings.

No one of the petitioners' specifications of error (Petitioners' brief, pp. 12, 13) sets forth an error warranting review by certiorari.

(1)

The Circuit Court of Appeals did *not* rule:

> "(1) That *all* defenses available against a national bank are available against its receiver after the bank has become insolvent, on the theory that such receiver stands no better than the bank itself." (Italics supplied.) (Petitioners' brief, p. 12.)

The court below ruled:

> "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank itself. In such an action he stands no better than the Bank itself" (R. 286).

(2)

The court below *did* rule, and properly (R. 286-288), substantially in accordance with specification numbered (2) (Petitioners' brief, p. 12):

"(2) That since Ragan (the Bank's president) knew that Cliff (the Surety Company's agent) was acting in fraud of his principal and violating the latter's instructions in executing the bonds, such knowledge on Ragan's part is to be imputed to the Bank with the result that the Receiver cannot recover on the bonds."

The principles involved are simply these:

A. Where the president of a bank receives an obligation for the bank with knowledge of its illegality, his knowledge is notice to the bank, which cannot enforce the obligation received through him and repudiate his knowledge.

B. Under such circumstances the receiver, seeking to recover on the obligation to the bank, stands in the shoes of the bank and cannot enforce the obligation on its behalf.

A. That Ragan's knowledge is imputed to the Bank, and prevents recovery by the Bank, seems clear. The Bank cannot take the bonds without being bound by the knowledge of its president, through whom it obtained them, that Cliff had no authority to issue them.

Curtis, Collins & Holbrook Co. v. *United States,* 262 U.S. 209, 222, 223.

Aldrich v. *Chemical Nat. Bank,* 176 U.S. 618, 627.

Bosworth v. *Maryland Cas. Co.,* 74 F. (2d) 519 (C.C.A. 7, 1935).

Porter v. *Beha,* 8 F. (2d) 65 (U.S. D.C. N.Y.).

Irving Trust Co. v. *State Bankers Financial Corp.,* 40 F. (2d) 90 (U.S. D.C. N.Y.).

Skud v. *Tillinghast,* 195 Fed. 1.

Tremont Trust Co. v. *Noyes,* 246 Mass. 197, 207.

Chapple v. *Merchants Nat. Bank,* 284 Mass. 122, 137.

Atlantic Mills v. *Indian Orchard Mills,* 147 Mass. 268, 275.
Loring v. *Brodie,* 134 Mass. 453, 457.
Skinner v. *Merchants Bank,* 4 Allen, 290.
Atlantic Bank v. *Merchants Bank,* 10 Gray, 532.
Metropolitan Trust Co. v. *Federal Trust Co.,* 232 Mass. 363, 367.

Since the Bank must trace its title through Ragan's act, it cannot recover on the bonds, because there is imputed to it (1) Ragan's knowledge that Cliff had no authority to write the bonds, and (2) the fraud upon the Surety Company, by which the bonds were obtained.

Porter v. *Beha,* 8 F. (2d) 65, *supra.*
Page v. *Trufant,* 2 Mass. 160, 162.
Hazard v. *Irwin,* 18 Pick. 95.

B. As it appears from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank, he stands in no better position than the Bank itself. The law on this point in the federal courts is clear. It is cited in the *Opinion of the Circuit Court of Appeals* (R. 287), as follows:

> "* * * All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the Bank affecting the character of the claim. While there are decisions by state courts to the contrary, the federal decisions support this position. *Scott* v. *Armstrong,* 146 U.S. 499, 507; *Cutler* v. *Fry,* 240 Fed. 238; *Yates Center National Bank* v. *Schaede,* 240 Fed. 240; *Yates Center National Bank* v. *Lauber,* 240 Fed. 237; *Fourth Street Bank* v. *Yardley,* 165 U.S. 634, 653; *Skud* v. *Tillinghast,* 195 Fed. 1, 5; *Peterson* v. *Tillinghast,* 192

Fed. 287, 289; *Keyes* v. *First National Bank,* 20 Fed. (2d) 678, 686; *Burrowes* v. *Nimocks,* 35 Fed. (2d) 152, 159; *Schumacher* v. *Eastern Bank & Trust Company,* 52 Fed. 925, 928-9; *Rankin, Receiver* v. *City National Bank,* 208 U.S. 541, in which case it was held that where the president of the insolvent bank had manipulated the accounts of the bank by giving a note for which no consideration passed, the only purpose of the transaction 'in fact and contemplation was a swindle upon the bank examiner.' The court said that 'The whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner', and that if the insolvent bank 'had sued while it was a going concern it could not have recovered and the receiver stands no better than the bank.' The facts of this case are more fully stated in *Cherry* v. *City National Bank,* 144 Fed. 587, 591."

(3)

The court below did *not* rule according to specification numbered (3) (Petitioners' brief, pp. 12, 13):

"That no estoppel arises in favor of the receiver, even though (a) Cliff's written and publicly disclosed power of attorney included authority to write bonds of this type; (b) he gave said bonds with the intent that they should appear to be valid and enforceable obligations of the Surety Company in favor of the Bank; (c) he intended that the bonds should be shown to the bank examiners, [bank directors and other interested persons, and relied upon by them as valid obligations of his principal;] (d) the duplicate originals of Cliff's power of attorney were furnished to him by the Surety Company for the purpose of having them shown

or delivered to third parties dealing with Cliff as proof of his unlimited authority; [(e) the bank examiners saw and relied upon the bonds and the power of attorney; (f) the bank examiners failed to seasonably discover the unsound and eventually insolvent condition of the Bank because of such reliance; and (g) the Bank's depositors and other creditors suffered loss because of such reliance.]'' (Brackets supplied.)

The Circuit Court of Appeals made no ruling in regard to any estoppel of the Surety Company beyond ruling that the matters included in the brackets above were not alleged in the pleadings.

The matters not included in the brackets leave the case squarely within the decision of this honorable Court in the case of *Rankin, Receiver,* v. *City National Bank,* 208 U.S. 541, *supra.* The matters bracketed were not alleged in the suits at bar, and are not available to the receiver by way of estoppel.

The Philadelphia, Wilmington & Baltimore R.R. Co. v. *Howard,* 13 How. 307, 335.
Gilson v. *Nesson,* 208 Mass. 368, 370, 371.
Guild v. *Richardson,* 6 Pick. 364, 369.

As the action of the court below did not deal with the principle upon which the petition is based, no writ ought to be granted.

United States v. *Rimer,* 220 U.S. 547; 55 L. Ed. 578.

III.

EVEN IF THE PETITIONERS WERE NOT LIMITED TO THEIR PLEADINGS, THERE IS NO SUCH CONFLICT IN THE DECISIONS OF THE FEDERAL COURTS AS TO WARRANT REVIEW BY CERTIORARI.

The question, being one of general law, the federal courts apply the rule laid down in the federal decisions.

Salem Trust Co. v. *Manufacturers' Finance Co. et al.*, 264 U.S. 182, 191, and cases cited.
See also 12 U.S.C.A. § 24, note 12, and cases cited.

The cases cited by the petitioners in their brief (pp. 22, 23), as federal court decisions sustaining their contention that there is such a present conflict of authority as to warrant review by certiorari, do not support their contention.

There can be no conflict in the decisions of the several Circuit Court of Appeals on the case stated in the pleadings, because the case of *Rankin, Receiver,* v. *City National Bank,* 208 U.S. 541, *supra,* settles the law that where an apparent obligation is given to a national bank for the purpose of deceiving the bank examiner, and the bank as a party to the fraud could not recover, the receiver stands in the shoes of the bank and cannot enforce the obligation. It appears from the facts in that case, as stated in the report of the case in the lower court, *Cherry* v. *City National Bank,* 144 Fed. 587, that the City National Bank had full knowledge of the intended deception. To that extent the case at bar is a stronger case for the Surety Company, which had no such knowledge.

The petitioners claim a distinction here based on actual deception of the examiner, and consequent deception of and injury to creditors and depositors; and say now that such additional facts would enable the receiver to recover, though the Bank could not, as "representative of the creditors."

They did not plead such facts or such claim, however, and the Circuit Court of Appeals has ruled that they are bound by their pleadings, and that the receiver cannot recover on grounds upon which his actions were not based. The findings of the master and auditor upon these points, therefore, were of facts not in issue (R. 288), which have not been tried, and are as if never made.

But even if they had pleaded properly, and had proved, such deception and injury, the federal cases cited in their brief (pp. 22, 23) do not support the contention of the petitioners that there is such a present conflict of authority as to warrant review by certiorari.

Pauly v. *O'Brien*, 69 Fed. 460 (C.C. S.D. Col. 1895), decided thirteen years before the case of *Rankin, Receiver*, v. *City National Bank*, 208 U.S. 541, *supra*, was a case in which it appeared that the defendant had given his note for the purpose of having it take the place of a note of no value, as an asset of the bank. The court said that if this was not so, and the note was given for a fraudulent purpose, the defendant would still be bound. The defendant was a party to the transaction, whatever it was. The court makes no distinction between the bank and its receiver; and does not base its decision on actual deception of and injury to creditors and depositors.

Federal Reserve Bank of Richmond v. *Crothers*, 289 Fed. 777 (C.C.A. 4, 1923) involved a note given by the defendant, at the request of the president of the bank, to take the place of an equivalent amount of bonds, the note to be returned on sale of the bonds. The court held that there was no intention to deceive the bank examiner, but that the defendant intended the note to be used as a real asset of the bank. The *Rankin* case was distinguished, the court saying (p. 780):

> "Again, there the court held that the Guthrie Bank itself was a party to the fraud perpetrated for its own benefit, and therefore could not recover a fictitious credit entered in its favor by the City National Bank."

No question was raised as to any distinction between the rights of the bank and its receiver, nor was there any question of deception of or injury to creditors of the bank.

In *Hohning* v. *Caldwell,* 10 F. (2d) 298 (C.C.A. 5, 1925) five directors and stockholders gave a note to remove an impairment of assets of the bank. The note was discounted elsewhere and the proceeds were used to increase the bank's assets. The court held that there was consideration for the note. The court distinguishes the case of *Peterson* v. *Tillinghast,* 192 Fed. 287, on the ground that there (as here) the maker was a disinterested third person. No distinction was made between bank and receiver, nor was there any question of deception of and injury to creditors and depositors.

In the District Court case of *Utley* v. *Clarke,* 16 F. Supp. 435 (D.C. N.D. N.Y. 1936), the plaintiff, a stockholder and director, sought to recover back from the receiver securities which he had lent to the president of the bank to be used to remove an impairment of the bank's capital, knowing that the bank's records would show no obligation to him. There was no fraud on him. It was held that he could not recover back the securities as against depositors and creditors on the ground of want of consideration. The case does not seem to have reached the Circuit Court of Appeals.

None of these cases is at variance with this Court's decision in the *Rankin* case. None is at variance with the decision of the Circuit Court of Appeals in the case at bar.

So far as we can learn, in not one of the cases cited by the petitioners or found by counsel for the respondent has any

court, state or federal, denied his defenses to a defendant who was, like the Surety Company in this case, not only ignorant of the transaction but a victim of the fraud, and who sought no benefit from it.

Respectfully submitted.

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OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, ET AL., *Petitioners*,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, *Respondent*

(AND SIX OTHER ACTIONS CONSOLIDATED THEREWITH).

BRIEF FOR STANDARD SURETY & CASUALTY COMPANY OF NEW YORK.

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, ET AL., *Petitioners*,

v.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK, *Respondent*

(AND SIX OTHER ACTIONS CONSOLIDATED THEREWITH).

BRIEF FOR STANDARD SURETY & CASUALTY COMPANY OF NEW YORK.

These cases come before this Court on certiorari from the Circuit Court of Appeals for the First Circuit.

OPINIONS BELOW.

The opinion of the United States District Court is not reported. It appears in the record at pages 139-141.

The opinion of the Circuit Court of Appeals for the First Circuit appears in the record at pages 281-288, and is reported in 90 F. (2d) 862.

The opinion of the Circuit Court of Appeals for the First Circuit denying a petition for rehearing appears in the record at pages 291-293, and is reported in 90 F. (2d)

862, 866. The order of this Court granting a writ of certiorari is reported in U.S. , 82 L. Ed. 102, 58 S. Ct. 143.

Statement of the Case.

The cases are concerned with four instruments purporting to be bonds of the Surety Company, and with certain other instruments purporting to be "endorsements" or extensions thereof. The suits in equity were brought by the Surety Company for cancellation of the instruments, and in those suits the Receiver made counter-claims on the instruments. The actions at law were brought by the Receiver on three of the instruments. The issues raised by the Receiver's counterclaims in the equity suits were identical with the issues in the actions on the bonds (R. 292, 293).

The cases were tried together before a single master and auditor. The major facts found by him, which were practically undisputed, are as follows:

Giving of the Bonds.

The Bank had made a loan to Cronin the soundness of which was open to question. Ragan, the president of the Bank, wanted to get Cronin's note guaranteed. No surety company would write a bond securing the loan without a premium and without security. Ragan approached Cliff, an agent of the Surety Company. Although Cliff had a broad power of attorney, Ragan knew that he had no authority to write the bonds here in question.

The Cronin bond and all of the subsequent bonds were written secretly by Cliff, purporting to act as agent of the Surety Company, at the request of Ragan, the president of the Bank. Each purported to guarantee payment of an obligation owing to the Bank. Cliff was an agent of the

Surety Company, and had a broad power of attorney. The Surety Company forbade his writing this type of bond; and denied to him authority to execute supplementary agreements, waivers, or acceptances of changes in contracts (R. 46, 47). Ragan knew that Cliff had no authority to write the bonds (R. 47).

Ragan induced Cliff to write the bonds by promising him that he (Ragan) would keep them in his personal file and use them only to show to the bank examiners if they asked to see collateral on the notes; that Cliff need not report the bonds to his Company or keep any record of them in his office; that no premium would be paid; that the bonds were simply "window dressing"; that they were valueless, imposed no liability and would not be enforced, and that they would be returned to Cliff shortly; and that Ragan would give Cliff a release, releasing the Surety Company from all liability on the bonds (R. 45-47).

In writing the bonds Cliff relied upon what Ragan said to him (R. 46, 47). As part of the same transaction in each case (R. 47), Ragan did give Cliff a release on each bond, running from the Bank to the Surety Company, and signed by Ragan as president of the Bank. Ragan immediately on receipt of each bond, without Cliff's knowledge, delivered it to the collateral department of the Bank. Cliff dealt only with Ragan; and Ragan acted alone in placing the bonds and "endorsements" in the files of the Bank, and in discounting the notes for which they were deposited as collateral, without the intervention of any independent officer of the Bank (R. 53). The Cronin (R. 45) and Stone (R. 50) obligations to the Bank were already outstanding when the bonds which purported to secure them were delivered by Cliff to Ragan.

Neither Cliff nor the Surety Company received any compensation or collateral for the bonds. Cliff kept no record of the transactions and did not report them to the Home

Office of the Surety Company. The Surety Company did not learn of the bonds until after the Receiver was appointed.

The Standard Surety Company was not negligent either in employing Cliff or in furnishing him with the power of attorney, stationery and seal (R. 54).

The Master and Auditor found that one Clark deposited $300,000 in the Bank in reliance upon its remaining open after an examination by the bank examiner, and upon a statement by Ragan to Clark's son that the debts here in question were secured by surety bonds of a company or companies unnamed. Neither Clark nor his son saw the bonds. Clark sued the Receiver to rescind the transaction on the ground, among others, that these bonds were fraudulent and uncollectible (*Clark* v. *Boston-Continental National Bank,* 9 F. Supp. 81, 83), and got a judgment, which has been satisfied.

There was no finding that the published statements of the Bank's condition would have been in any different form if the bonds had not existed, or that any depositor or other creditor relied on the published statements (R. 58). There is no affirmative finding that, but for the bonds, the Bank would have been closed sooner than it was (R. 59). There is no finding that the Bank was insolvent when the bonds were given.

There is no finding that any of the primary obligations to the Bank which the bonds purported to secure could not have been collected from the principals had the Bank attempted to enforce them as they matured.

Notice of Default.

In each of the four bonds there was a provision that, in the event of default on the part of the principal, the Bank should notify the Home Office of the Surety Company by

registered mail within ten days of such default (R. 73, 74, 93, 97, 99, 100).

The Master found that notice was not given on time in the case of the Stone and Robinson bonds.

The Cronin bond ran for six months from September 6, 1930. The first Cronin note matured September 22, 1930. As or after each note matured he gave a new note. There were sometimes intervals, one as long as sixty-three days, between maturity and new note (R. 78). The bond ran until March 6, 1931. There was no "endorsement" executed by Cliff until March 21, 1931, fifteen days after the expiration of the bond (R. 77). The Surety Company was first notified of default on November 4, 1932. The last of the series of Cronin notes matured on November 3, 1932 (R. 78).

As to the Westchester bond, the Master found that notice was not given in accordance with the terms of the bond, but may have been in accordance with one of the endorsements as construed by him (R. 79). But he had already found that the bond did not describe the obligation in question (R. 49), as a careful textual examination would have shown (R. 55), and had ruled that there was no liability upon the Westchester bond (R. 72).

Election of Remedies.

Before issue was joined in any of these seven cases, and before he brought suit in the law actions, the Receiver filed a sworn proof of loss against the Fidelity & Deposit Company of Maryland, under which he claimed a right to recover under certain banker's blanket bonds written by that Company, on the ground that the four bonds here in question were fraudulent and uncollectible. The Receiver later brought an action in the District Court against the Fidelity & Deposit Company on these blanket bonds, in which he

relied upon that proof of loss. Still insisting upon his claim, he entered into a compromise agreement with the Fidelity & Deposit Company, and that case went to judgment in his favor. That judgment has been satisfied (R. 81-88). The Surety Company was a re-insurer of the Fidelity & Deposit Company with reference to its obligations under these blanket bonds, as counsel for the Receiver knew before going to judgment in the action on the blanket bonds (R. 88).

Certain Objections to the Report of the Master and Auditor.

As to the facts, there are several statements in the Report, and findings and conclusions of fact, with which the Surety Company disagrees.

1. On page 3 of his Report (R. 43) the Master states that the Surety Company contends :

> (1) That the bonds were given by Cliff without authority and without consideration, as part of a fraudulent scheme of Cliff and Ragan, designed to deceive various persons, etc.

The Surety Company does not so contend, or rely upon any intent of Cliff's to deceive any one. Upon the evidence, the only person to whom Ragan told Cliff that he might show the bonds was the bank examiner (R. 45, 47, 50, 52).

2. The facts found by the Master in regard to Clark, and the evidence in regard to Clark, do not warrant the conclusion on page 23 of the Report (R. 58) where the Master says:

> "And I therefore conclude and find that Clark relied upon the existence of these bonds in investing $300,000. in the bank."

3. The facts found by the Master in regard to other depositors do not justify the Master's conclusion (R. 59) that depositors subsequent to the bank examination of September, 1931, relied upon the bonds; and the Master's attitude on the *questions of fact* in regard to reliance on the bonds by Clark and others ought not properly to be "influenced to some extent by the circumstances that the proof of reliance in this case seems more direct than in other reported cases" (R. 60).

4. On the evidence as set forth in the Report the Master could not find, as he purports to (R. 59), that depositors after September 5, 1931, "are still creditors of the bank in an amount exceeding the face value of the bonds" (see evidence reported in Exhibit H, Record, pp. 103, 104).

Introduction to Argument.

The Bank perpetrated a fraud upon the Surety Company in obtaining the bonds. The Receiver now seeks to enforce the bonds, so obtained, for the benefit of all the creditors of the Bank. He must take the bitter with the sweet, and cannot take the bonds without the burden of the fraud upon the Surety Company.

The bonds do not represent any asset of the Bank which would constitute a trust fund in the hands of the Surety Company. It is not claimed that they ever had or could have had any substance. The only question is whether the Surety Company is "estopped" to set up the fraud by which the bonds were obtained, namely, the fraud which Ragan induced Cliff to assist him in perpetrating upon his principal.

To accomplish such an "estoppel" the Receiver, as the "representative" of creditors, resorts to the ambiguous use of words. Citing an imposing array of state and fed-

eral cases, in not one of which is there any authority for holding the defrauded Surety Company in this case, the Receiver derives a general principle of public policy that one who participates in a fraud upon a bank examiner, by giving his note to the bank as an apparent asset, will not be heard to assert his own wrong as a defense on the note—which principle is frequently spoken of as an "estoppel" to set up the defense against the Receiver as the "representative" of the Bank's depositors.

As that "estoppel" obviously—and as expressly stated in some of the cases—would not "estop" an innocent party like the Surety Company here to set up as a defense the fraud practised upon it in this case, the Receiver tries to resort to a second "estoppel," based upon the principle that, where a principal has clothed his agent with apparent authority, the principal will be "estopped" to deny that authority as against any one who, in good faith, dealt with the agent in reliance thereon.

Cases asserting an estoppel against the innocent principal are of two kinds: cases in contract and cases in tort.

In the contract cases the principal may be estopped to deny the agent's authority as against any one who contracted with the agent relying in good faith upon the apparent authority. In the case at bar the other party to the contract is the Bank, not an innocent purchaser for value but a party itself chargeable with the fraud. The Receiver cannot, therefore, enforce the bonds as obligations of the Bank's which the Surety Company is estopped to deny. None of the Receiver's cases holds that he can.

In the tort cases the principal may be liable if, through the appearance of authority given to the agent, the latter, though acting against his principal's interest, has been enabled to deceive a person of a class to which the principal owed a special duty. In such cases the principal may be liable for damages to the person so deceived. The only

persons whom the Receiver here even claims were deceived to their injury were those individual creditors and depositors who put money into the Bank after the examiner had seen the bonds.

Even if the Surety Company had owed a special duty to those individual creditors and depositors (which it did not), and they had suffered definite and ascertainable damages in reliance upon the power of attorney (which has not been shown), any rights of recovery would be their individual rights, and not the right of the Receiver. Here again the cases are clear.

The Receiver, however, resorting to an ambiguous use of the word "represent," claims that he can assert the rights of these individual creditors and depositors because he "represents" the creditors and depositors of the insolvent bank.

If these individual creditors and depositors had any rights of recovery against the Surety Company which the Receiver can enforce, as distinct from a right of the Bank as the supposed obligee of the bonds, such causes of action were not pleaded. The cases were tried upon the pleadings, which were based upon the Receiver's claims upon the bonds as such.

It would be contrary to equity and good conscience for the Court to enforce against the defrauded Surety Company those bonds which came into the Receiver's hands through the fraud of the Bank's president, for which the Surety Company received nothing, and the proceeds of which, if they were enforced, would go in large proportion to creditors and depositors who by no stretch of the imagination can be said to have been deceived or injured by the power of attorney.

A desire for fundamental justice has led some courts, apparently, to cut through traditional precedent upon a broad rule of public policy and to hold a participant in

the wrong liable upon his promissory note given for the purpose of deceiving a bank examiner. It is doubtful that justice in any of the cases has called for a rule emancipated from the safeguards of legal principle. And however sound the application of such a rule of public policy may be in a case in which it is applied to hold liable one who is chargeable with the wrongful intent, the very sense of justice from which it springs should prevent it from becoming itself a traditional precedent to be applied, regardless of justice, in such a way as to make liable one who is ignorant that any obligation was ever given in his name, and is himself a victim of the fraud by which the bank obtained it. No case cited by the Receiver or found by counsel for the Surety Company has ever applied the principle in such a case.

The cases cited by the Receiver in support of his first "estoppel" are, almost without exception, concerned, not with actual injury to creditors and depositors, but with an intention to deceive the bank examiner. As the Surety Company here had no such intention, and, as will be shown, is not chargeable with any such intention, the Master and Auditor and the Receiver have both laid stress on actual deception of creditors and depositors. The Court is asked to rule that, where injury to depositors may be assumed, one who has made such assumed injury possible—the person who has, however blamelessly, allowed to come into the hands of the bank an instrument with which its fraudulent officer has practised a deception on the examiner—should be estopped to set up as a defense a fraud practised upon him by such bank or officer in obtaining or misusing the instrument.

One illustration alone should be enough to indicate the mischief to which such a doctrine would lead; Suppose that a man or woman were to place a negotiable bond, or an endorsed stock certificate, in the hands of a bank for a

perfectly proper purpose—as, for example, for safe keeping, or as excess collateral on a loan—and the bank's officers were, at the time of examination, to remove it from one place to another and were to show it to the bank examiner as an asset of the bank or as security for another obligation, and the deception were to cause injury to subsequent depositors. Under such circumstances the power to deceive given to the bank would be at least as great as any given by the Surety Company here. The likelihood of such misuse would be far more easily foreseeable. But to hold that in such a case the true owner would have to forfeit his bond or stock to the receiver for the benefit of all the creditors and depositors, who were not innocent purchasers for value, would impose a risk which has not been imposed in any case cited by the Receiver, and which would violate established principles of commercial dealings.

Academic interest in the questions which the petition for writ of certiorari attempts to raise tends to overshadow the other grounds of defense, either of which in an ordinary case should be sufficient in itself:

(1) The Receiver has brought one action in which he has gone to judgment and had his recovery upon his claim that these bonds were fraudulent and uncollectible, and in which he never abandoned that position until the judgment was satisfied.

(2) Even assuming that the bonds were valid obligations of the Surety Company, neither the Bank nor the Receiver gave the notice of default required by their terms.

Argument.

I.

The Bonds were Obtained by the Bank Through Fraud upon the Surety Company and are Void.

The fraud which clings to these bonds and renders them unenforceable against the Surety Company is not the fraud which Ragan practised upon the bank examiner; it is not the fraud which Ragan practised on Cliff; it is the fraud which Ragan practised upon the Surety Company, and by which the Bank obtained the bonds. The Surety Company does not have to rely upon the releases, or upon Ragan's false assurances to Cliff, which the Master found were parts of the same transaction (R. 47); nor need it rely upon the duress by which Ragan obtained all but the first bond (R. 49). It relies upon no act of Cliff as its agent. It simply repudiates the acts of Cliff in giving the bonds without authority, without apparent authority so far as the only obligor, the Bank, is concerned, and in fraud of the Surety Company, his principal.

A.

The Bonds were Obtained Through Fraud upon the Surety Company.

The Master and Auditor ruled as follows:

> "3. I rule that the bonds and 'endorsements' in suit were not binding obligations in the hands of the bank as a going concern, for the reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and 'endorsement' would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors" (R. 61, 62).

This ruling was not excepted to by the Receiver in "Plaintiff's Exceptions to Auditor's Report" (R. 129, 130).

The decrees and judgments confirm the Master's ruling in this respect.

The judge of the District Court ruled as follows:

> "Upon these facts the bonds did not constitute valid obligations of the Standard Surety and Casualty Company and could not have been enforced by the Boston-Continental Bank" (R. 140).

The Circuit Court of Appeals ruled that, the taking of collateral for a loan being within the scope of Ragan's authority as president of the bank—

> "any notice to him of its illegality is notice to the bank" (R. 285).

Although counsel for the Receiver have not heretofore seriously contended that the Bank could recover on the bonds, it may make the scope of the subsequent argument clearer if the position of the Surety Company on this point is stated here:

1. *The Surety Company gave Cliff no authority to write these bonds.*

> "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."
>
> Restatement of the Law of Agency, § 7, Authority.
>
> 2 Corpus Juris Secundum, Agency, § 95.

The Master found (R. 46, 47) that the Surety Company had, by letter to Cliff, given to him with the power of attorney, denied him permission to execute note-guaranty bonds without prior authority from the home office in each specific instance, and had specifically denied him authority to execute "supplementary agreements, waivers, acceptances of changes in contracts," etc.

Cliff had, of course, no authority to write bonds without premiums, as these bonds were written (R. 47).

> "* * * any authority, howsoever broadly it may be expressed, is to be confined, in the absence of definite manifestations of a contrary intent, to the doing of such things as are incident and appertain to the business of the principal and to that part of such business entrusted to the agent's care and such as are undertaken for the benefit of the principal and the furtherance of his interests."
>
> 2 Corpus Juris Secundum, Agency, § 94.

Even Cliff's broad power of attorney could be used only in the business of his principal.

> "The authority of a general agent is not unlimited; it must necessarily be restrained to the transactions and concerns appurtenant to the business of the principal."
>
> *Odiorne* v. *Maxcy,* 13 Mass. 177, 181.

> "His authority under the power of attorney was not unlimited. It was necessarily restricted to transactions appurtenant to the business and designed for the benefit of the owner."
>
> *English* v. *English,* 229 Mass. 11, 13.

"Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."

Restatement of the Law of Agency, § 39.
Ebert v. *Haskell,* 217 Mass. 209, 211.
And see *Union Stock Yards* v. *Gillespie,* 137 U.S. 411, 423.
Hanrick v. *Patrick,* 119 U.S. 156.
Wadsworth v. *Adams,* 138 U.S. 380.
Quinn v. *Boston,* 195 Mass. 277.
Mead v. *Phoenix Ins. Co.,* 188 Mass. 124, 126.
Fay v. *Winchester,* 4 Met. 513, 517.

Cliff's acts in writing the bonds were not in pursuance of his agency, but in abandonment of it.

Thomson-Houston Electric Co. v. *Capitol Elec. Co.,* 65 Fed. 341, 343 (C.C.A. 6).
Wen Kroy R.C. v. *Pub. Nat. Bk. & Tr. Co.,* 260 N.Y. 84, 89.

2. So far as Ragan was concerned Cliff had no apparent authority to write the bonds.

As the Master found, it—

"Would have been obvious to anyone and was obvious to Ragan that Cliff [as he told Ragan] had no authority to do what he was doing, and that the bonds would not be reported to the home office. The writing of the bonds without premium was not within Cliff's apparent authority" (R. 47).

The Surety Company had given Cliff a broad power of attorney and had limited its scope by letter. A third per-

son, dealing in good faith with Cliff as the agent of the Surety Company, in the regular course of business, and seeing only the power of attorney, and being ignorant of any limitations on his authority, might be able to hold the Surety Company on a bond running to such third person and executed by Cliff in the name of the Company. But Ragan knew that Cliff had no authority to write the bonds (R. 47).

> "Private instructions or limitations are valid and operative as between principal and agent, authority for the purpose of determining their relations and the incidents thereof being the remainder left after subtracting from the total extent of the powers given whatever included matters may have been withdrawn or excepted from the general grant. Moreover, a third person dealing with an agent cannot disregard with impunity qualifications of this character which he does or should know, for, as is shown in § 92, non-secret limitations on, or restrictions of, the agent's powers are binding upon those who deal with him, having knowledge or notice of the limitations."
>
> 2 Corpus Juris Secundum, Agency, § 95.
> *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364.
> *Welch* v. *Hartford Fire Ins. Co.*, 73 N.Y. 5.
> *Marsh* v. *S.M.S. Co.*, 289 Mass. 302, 306, 307.
> *Howard* v. *Barnstable Nat. Bk.*, 197 N.E. 40, 43 (Mass. 1935).

(a) "If a third person has such information as would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the conditions known to him, he cannot subject the principal to

liability. Any substantial departure from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization."

(b) "As stated in § 39, it is inferred that an agent has authority to act only for the principal's benefit. If, therefore, the third person has reason to believe that the agent is acting for his own benefit, he cannot subject the principal to liability upon a contract which is in fact unauthorized."

(c) "Where circumstances indicate that the agent may be acting in fraud of the principal, a person dealing with the agent is required to exercise care in investigation, in order to hold the principal liable."

Restatement of the Law of Agency, § 166, c. 6. See also §§ 49, 165, 273.

3. In obtaining the bonds Ragan was perpetrating a fraud upon the Surety Company.

Ragan persuaded Cliff to act in collusion with him and to write the bonds and endorsements which he knew Cliff had no authority to write. He knew and intended that Cliff should withhold all knowledge of the bonds from the Surety Company, contrary to Cliff's duty to his principal, and knew and intended that the Surety Company should receive no benefit from the transaction, no premium and no collateral, and that the bonds, if enforceable, would subject the Surety Company to heavy liability (R. 44-53).

This was a fraud upon the Surety Company of which Ragan, as its instigator, had knowledge.

Crocker v. *United States*, 240 U.S. 74, 81.
Slocum v. *N.Y. Life Ins. Co.*, 228 U.S. 364, 374 (*supra*).

Hoffman v. *Hancock Life Ins. Co.*, 92 U.S. 161.
Restatement of the Law of Contracts, § 471.
Pacific Lumber Co. v. *Moffat*, 134 Fed. 836, 838 (C.C.A. 8, 1905).
Washington, A. & Mt. V. Ry. Co. v. *Real Estate Trust Co.*, 177 Fed. 306, 311, 312.
Metropolitan Trust Co. v. *Federal Trust Co.*, 232 Mass. 363, 367.
3 Corpus Juris Secundum, Agency, § 280.
Restatement of the Law of Agency, §§ 180, a, 312-315.

B.

THE FRAUD IS IMPUTED TO THE BANK.

The Bank was represented in the transactions solely by Ragan (R. 53, 63). Ragan knew that Cliff had no authority to write the bonds (R. 47).

The Bank took the bonds charged with the fraud of Ragan, through whom it obtained them.

Curtis, Collins & Holbrook Co. v. *United States*, 262 U.S. 215, 222, 223.
United States v. *State National Bank of Boston*, 96 U.S. 30.
Mechanics Universal Joint Co. v. *Culhane*, 299 U.S. 51, 57.
Crocker v. *United States*, 240 U.S. 74, 81.
McIntyre v. *Pryor*, 173 U.S. 38, 52.
Veazie v. *Williams*, 8 How. 134, 137.
Aldrich, Receiver, v. *Chemical National Bank*, 176 U.S. 618.
Munroe v. *Harriman et al.*, 85 F. (2d) 493, 495 (C.C.A. 1, 1936; certiorari denied).

Bosworth v. *Maryland Cas. Co.*, 74 F. (2d) 519 (C.C.A. 7, 1935).

Porter v. *Beha*, 8 F. (2d) 65 (U.S. D.C. N.Y.).

Irving Trust Co. v. *State Bankers Financial Corp.*, 40 F. (2d) 90 (U.S. D.C. N.Y.).

Salter v. *Williams*, 244 F. 126, 156 (certiorari denied, 250 U.S. 653).

Skud v. *Tillinghast*, 195 Fed. 1.

Tremont Trust Co. v. *Noyes*, 246 Mass. 197, 207.

Chapple v. *Merchants Nat. Bank*, 284 Mass. 122, 137.

Merchants Nat. Bank v. *Marden Orth Co.*, 234 Mass. 161, 171.

Atlantic Cotton Mills v. *Indian Orchard Mills*, 147 Mass. 268, 275.

Loring v. *Brodie*, 134 Mass. 453, 457.

Skinner v. *Merchants Bank*, 4 Allen, 290.

Atlantic Bank v. *Merchants Bank*, 10 Gray, 532.

Metropolitan Trust Co. v. *Federal Trust Co.*, 232 Mass. 363, 367.

Wasserman v. *Cosmopolitan Trust Co.*, 252 Mass. 253.

Restatement of the Law of Agency, §§ 274, 282 (2), (c), Comment f, pp. 629, 631.

Clark v. *Reeder*, 158 U.S. 505.

Salterwhite v. *Harriman Nat. Bk.*, 13 F. Supp. 489.

Washington, A. & Mt. V. Ry. Co. v. *Real Estate Trust Co.*, 177 Fed. 306, 311, 312.

Maryland Casualty Co. of Baltimore, Md., v. *Queenan*, 89 F. (2d) 115.

Ragan's knowledge of Cliff's want of authority to write the bonds, and Ragan's fraud upon the Surety Company in obtaining them, are imputed to the Bank. Although

the Master so ruled (R. 61-65), and although neither Bank nor Receiver excepted to this ruling (R. 129, 130), and although the Receiver's counsel disclaimed the contention in oral argument in the District Court (R. 143), and the District Court likewise ruled that the Bank could not have enforced the bonds (R. 140), counsel for the Receiver have since taken the position that Ragan's knowledge cannot be imputed to the Bank, because, as they claim, Ragan was acting solely in his own interest and against the interest of the Bank and as the agent of Cliff.

That position is untenable. The Master and Auditor found not only that Ragan knew of the infirmities in the bonds and endorsements, but also that he alone acted for the Bank in obtaining them for the Bank.

> "Neither he [O'Donnell] nor any other officer or employee of the Bank except Ragan had anything to do with negotiating for the bonds or 'endorsements' here in question" (R. 53).

Ragan alone approved the loans for which they were deposited as collateral.

> "All of the loans and renewals were granted by Ragan without prior consultation with the directors" (R. 53).
>
> "In the case at bar the loans were granted by Ragan's sole authority" (R. 64).

Furthermore, the obtaining of the bonds by Ragan was for, and not against, the interests of the Bank. The Cronin note had already been discounted for a week before Ragan even talked with Cliff (R. 45). The Cronin bond was given two weeks after the discount of the note (R. 93). The discounting of the Westchester note does not appear to have caused any withdrawal of funds from the Bank, the pro-

ceeds having been used to take up stock in the Bank (R. 49). (There is no contention that the Boston-Continental National Bank does not stand in the same position as the Continental National Bank with reference to the Surety Company (R. 44).) In any event, as the Master and Auditor has found, there was no evidence as to whether the four notes covered by the Westchester bond were ever signed or endorsed by the Westchester Discount Corporation or whether they were ever paid (R. 49). The Stone obligation had already been incurred before the Stone bond was given (R. 50). The Robinson bond was given before the Robinson note was discounted; but there is nothing to indicate that Ragan received any part of the proceeds of the Robinson note (R. 51, 52), or that Ragan intended the Robinson bond as a benefit to any one besides the Bank.

Even if Ragan had been acting adversely to the interests of the Bank in receiving the bonds, the Bank cannot now seek to profit by his act without being affected by his knowledge of the bonds' infirmities, particularly since Ragan was the sole agent through whom the bonds were obtained.

> "As stated by the American Law Institute, if the principal knowingly retains a benefit through the act of the agent which he would not otherwise have received, he is affected by the knowledge of the agent, although the agent was acting adversely.
>
> "A qualification of the rule that the knowledge of an agent engaged in an independent fraudulent act on his own account is not the knowledge of the principal has also been made when the agent, though engaged in perpetrating an independent fraudulent act on his own account, is the sole representative of the principal. It is held under such circumstances that the agent's knowledge is imputable to his principal, and that the

case falls within the general rule imputing the agent's knowledge to the principal."

2 American Jurisprudence, p. 300, Agency, § 380.

In *Curtis, Collins & Holbrook* v. *United States,* 262 U.S. 215 (*supra*), the company had paid for lands obtained for it by Holbrook, who made a profit on each transaction. This Court held the company chargeable with the fraud in the patents known to Holbrook, and said (by Taft, C.J., at p. 222):

"Under these circumstances, we do not think the company can be treated as a bona fide purchaser. It was charged with Holbrook's knowledge because he was the sole actor for the company in procuring the fraudulent patents * * *.

"The company and all its stockholders were charged with notice of any facts impairing the titles, of which in securing them, Holbrook was advised. In other words, the Company in taking over the titles took them *cum onere*" (citing *Atlantic Cotton Mills* v. *Indian Orchard Mills,* 147 Mass. 268).

Referring to *American National Bank* v. *Miller,* 229 U.S. 517, cited by the Receiver, the Court said:

"The president of the Macon bank was engaged in something in which his interest was plainly independent of any agency of his on behalf of the bank. His payment of his note was his own business, and not the bank's, as his principal. In the case at bar, Holbrook was the sole agent acting for the Company, he was violating his instructions; but he and the Company were in a common adventure, and if the Company insists on retaining the fruits of that adventure, it must be

charged with the knowledge of the agent through whom the fruits came."

In *Munroe* v. *Harriman*, 85 F. (2d) 493 (*supra*) (C.C.A. 1936; certiorari denied, 299 U.S. 443), Harriman had obtained loans from the bank of which he was president for a dummy corporation of his, and had pledged as collateral for the loans securities entrusted to him for another purpose. The Court held that the owner of the securities could recover them from the receiver of the bank, and said (by Swan, Cir. J.):

> (P. 496) "His will alone caused the making of the loan and the acceptance of the collateral. Therefore he should be treated as the sole actor on behalf of the bank as fully as though he had physically placed the borrower's note and securities in the bank's vault and paid over the borrowed money without the knowledge of any other officer. In such case, as already pointed out, the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title. • • •" (The *Curtis* case is cited.)

The fact that Ragan may have been animated in part by a wish to avoid disclosure of past indiscretions did not make the deposit of the bonds any less a benefit to the Bank. In *Bosworth* v. *Maryland Casualty Company*, 74 F. (2d) 519 (*supra*) (C.C.A 7, 1935), Taylor, the president of the bank, had deposited as collateral to his personal account bonds of an estate of which he was trustee. It was held that the surety on his bond as trustee could recover the bonds from the bank's receiver. The Court said (p. 520):

> "The transaction was in no way detrimental to the bank and of no benefit to Taylor, except as it postponed his day of wrath • • •.

"We think the Court was quite justified in holding that Taylor as sole agent of the bank, received the bonds for the bank, and that his knowledge of the fraud was properly imputed to the bank." (The *Curtis* case is cited.)

In *Atlantic Cotton Mills* v. *Indian Orchard Mills,* 147 Mass. 268 (*supra*), the common treasurer of two corporations covered the deficit of one with checks of the other, drawn by himself as treasurer. The Court, in allowing a credit for the checks to the defrauded corporation in an accounting between the two corporations, said (p. 275):

"The important consideration is, how the plaintiff became possessed of the money; and it is apparent that it was through the act of no other person than of Gray himself. It is true that no officer of the plaintiff besides Gray knew of the fraudulent origin of these checks; but in the very transaction of receiving them the plaintiff was represented by Gray, and by him alone, and is bound by his knowledge.

"Want of knowledge [of fraud] cannot in the view of the law exist, when the party in the particular transaction is represented solely by one who has knowledge. The rule is general, that, if one who assumes to do an act which would be for the benefit of another, commits a fraud in so doing, and the person for whose benefit the fraud will enure seeks, after knowledge of the fraud, to avail himself of [that] act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured."

In *Indian Head National Bank* v. *Clark,* 166 Mass. 27, relied upon by the Receiver, accommodation indorsers of

negotiable paper were held liable to the bank, whose cashier intended when discounting it to use it to defraud the bank. As pointed out by the Master (R. 64, 65), this case, so far as inconsistent with the doctrine of *Atlantic Cotton Mills* v. *Indian Orchard Mills* (*supra*), has been distinguished and limited by *Tremont Trust Co.* v. *Noyes,* 246 Mass. 197. And in *Chapple* v. *Merchants National Bank,* 284 Mass. 122, which reiterates the doctrine of the *Atlantic Cotton Mills* case, the Court recognized this by saying (p. 139):

> "*Tremont Trust Co.* v. *Noyes,* 246 Mass. 197, 207, distinguishing anything appearing *contra* in *Indian Head National Bank* v. *Clark* 166 Mass. 27."

In the *Chapple* case the Court said (p. 137):

> "These decisions rest upon the doctrine that when a corporation receives funds belonging to a third party through the hands of its officer acting in that capacity, who knows that the funds have been wrongfully obtained from the owner and no other officer know the facts, it does not acquire good title to the money against the true owner."
>
> *Chapple* v. *Merchants National Bank,* 284 Mass. 122, 137, and cases cited.

In *Tremont Trust Co.* v. *Noyes* (*supra*), the plaintiff had been closed by the Commissioner of Banks. In its hands was a note which the defendant had signed in blank and delivered to the treasurer of the plaintiff with instructions as to how to fill in the blanks. The note was filled in by the treasurer for nearly ten times the authorized amount. The Court held that the trust company in the hands of the Commissioner could not recover on the note. After stating the general rule that an agent's knowledge of fraud is imputed to his principal, and the exception to that rule where

the agent is engaged in an independent fraudulent act, the Court goes on (p. 207):

> "But that exception does not obtain when the transaction, so far as concerns the principal, is undertaken and consummated wholly by the faithless agent in the prosecution of his perfidious scheme without the innocent intervention of any other agent of the principal and the principal does not repudiate that scheme when informed of it but undertakes to avail himself of its fruits. When the assets of the principal are by the hand of the treacherous agent in the execution of the fraud exchanged for the new security, be it note or other thing of value, then the knowledge of the agent is imputed to the principal. If the faithless officer acts alone in discounting a note and misappropriates the proceeds, then the bank is bound by his knowledge of the circumstances under which he had obtained it from the defendants. A subsequent ratification by officers ignorant of the nature of the original transaction does not change its character. Under these circumstances another principle of law becomes operative, namely that where one undertakes to profit by the act of another as agent, he must adopt the act as a whole and take the bitter with the sweet. One cannot take the gains of a fraud without also bearing its burdens."

Both *Curtis, Collins & Holbrook Co.* v. *United States,* 262 U.S. 215 (*supra*), and *Atlantic Cotton Mills* v. *Indian Orchard Mills,* 147 Mass. 268 (*supra*), have been cited repeatedly by both federal and state courts in support of the principles here advanced.

As no other officer or employee had anything to do with negotiating for the bonds and "endorsements," and as all loans and renewals were granted by Ragan without prior consultation with the directors (R. 53), no events subse-

quent to the receipt of the bonds could relieve the Bank of the onus of Ragan's knowledge of the infirmities in the bonds. In *Skinner* v. *Merchants Bank,* 4 Allen, 290 (*supra*), the other officers of the bank saw and counted the money fraudulently obtained, yet the Court held (Hoar, J., p. 296)—

> "that money obtained by fraud and conspiracy, received by the bank through Hooper, a partaker in the fraud, without consideration, did not become the property of the bank; and that no transfer from one officer to another in the bank, for the purpose of counting and ascertaining what money the bank had, could change the property * * *."

And in *Loring* v. *Brodie,* 134 Mass. 453 (*supra*), it was said (p. 462):

> "While the same transaction continues, however its form may change, the knowledge or the duty which existed at the time of its inception is still attached to it. It must be held, therefore, that the bank knew that the bonds belonged to the trust, and it was a duty that it should inquire whether there was any authority to pledge them, which inquiry would have revealed the misuse made of them by Brodie."

In *United States* v. *State National Bank of Boston,* 96 U.S. 30 (*supra*), Hartwell was cashier of the Sub-Treasury at Boston. He had embezzled a large amount of money of the United States by lending it to Carter. The funds of the Sub-Treasury were to be examined. To tide Hartwell over the crisis Carter bought gold certificates from the Merchants National Bank and paid for them by his certified check on the State Bank. It was arranged between Carter and the State Bank that the bonds when delivered by the Merchants Bank should be taken to the Sub-Treasury and

be left there until the next day, and receipt for them was to be taken in the meanwhile. This was done. The receipt was taken in Carter's name and by him endorsed to the State Bank. The next day the receipt was presented and the Sub-Treasury refused to deliver the certificates. The State Bank sued the United States in the Court of Claims. The State Bank was ignorant of the fraud. *Held:* The State Bank could recover.

> "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial.
>
> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved. *Atlantic Bank* v. *Merchants Bank,* 10 Gray 532 and *Skinner* v. *Bank,* 4 Allen 290, are, in their facts, strikingly like the case before us, and they involved the same point. It was held in each of those cases, after an elaborate examination of the subject, that the defrauded bank was entitled to recover.
>
> "But surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.
>
> "The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal."

A review of the cases will be found in the annotations to *Gordon* v. *Continental Casualty Co.*, 319 Pa. 555, reported in 104 A.L.R. 1238. In that case the Court said:

> "It is argued by appellant's counsel, and we think convincingly, that the adverse interest exception to the rule that knowledge of a corporate officer is knowledge of the corporation applies only when a third person seeks to enforce some demand against the corporation, but the exception has no application where the corporation seeks to enforce the benefit of a fraud perpetrated by the officer on a third person; that the exception to the rule of imputed knowledge is not a vehicle for the consummation of fraud."

As the Bank must trace its title through Ragan's act, it cannot recover, because there is imputed to it Ragan's knowledge of Cliff's want of authority, and Ragan's fraud upon the Surety Company. These two defenses are open to the Company, not only as against the Bank, but also against any one whose claim of interest comes through the Bank. Furthermore, neither of these defenses requires reliance by the Surety Company upon Cliff's agency, so as to give any excuse for imputing to the Surety Company any knowledge or intention of Cliff's. They are based upon Cliff's want of authority and the fraud upon his principal, and knowledge thereof by the only person with whom he dealt as representing the only obligee of the bonds, the Bank. Any one who seeks recovery on the bonds without being barred by these defenses must show that he has a good ground of recovery aside from the facts of the direct transaction between Cliff and Ragan; that he has been misled by an act of the Surety Company itself—which is to say, by the power of attorney.

Cliff's knowledge cannot be imputed to the Surety Company so as to deprive it of its defense.

"A principal may avoid liability on any contract made by his agent in his behalf where there was fraud or collusion with the third person. * * *"

3 Corpus Juris Secundum, p. 183, Agency, § 252.

The Surety Company, unlike the Receiver, does not affirm the fraudulent transactions and seek to accept their fruits. Reliance on Cliff's acts, therefore, is not necessary to its defense, and Cliff's knowledge while engaged in the fraud is not imputed to the Surety Company.

Crocker v. *United States,* 240 U.S. 74; 60 L. Ed. 533.

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, but to subserve simply his own personal ends or to commit some fraud against his principal. In such cases the principal is not bound by acts or declarations of the agent unless it be proved that he had at the time some notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

American Surety Co. v. *Pauly,* 170 U.S. 133, 156; 42 L. Ed. 977.

"The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside the scope of his agency, and it would therefore be

most unjust to charge the principal with knowledge of it."

> Taft, J., in *Thomson-Houston Electric Co.* v. *Capitol Electric Co.*, 65 Fed. 341, 343 (C.C.A. 6); quoted in *Munroe* v. *Harriman*, 85 F. (2d) 493, 111 A.L.R. 657, 662.

A principal is not chargeable by implication with knowledge acquired by his agent when engaged in a scheme to defraud the principal, nor is he chargeable with constructive notice of the circumstances under which the agent acted in the prosecution of such scheme.

> *Henry* v. *Allen*, 151 N.Y. 1.
> *National Life Ins. Co. of the U.S.* v. *Minch*, 53 N.Y. 144.

And see Mechem on Agency (2d ed., 1914), § 1815.

> "The knowledge of its faithless agent is not imputed to the plaintiff as principal. The agent was conducting for his own benefit a fraudulent scheme against the interest of the plaintiff and therefore could not in that particular act for the plaintiff."
>
> *J. C. Penney Co., Inc.*, v. *Schulte Real Estate Co., Inc.*, Mass. 1935 Advance Sheets, pp. 2011, 2013.

C.

The Receiver Takes the Bonds Subject to Their Infirmity Arising Out of the Fraud upon the Surety Company.

The Receiver asserts that—

> "the Surety Company's defense rests upon the astounding proposition that the depositors and other

> creditors of a national bank may be despoiled by a conspiracy • • • and that • • • the conspirator whose promissory obligation was the instrument of the fraud may escape liability by showing that the obligation was not supported by any consideration moving from the bank or to the promissor or that the faithless bank official agreed, purportedly on behalf of the bank, that the obligation would not be enforced. • • •"
> (Petitioner's Brief, pp. 59, 60).

It is in refutation of this proposition that the Receiver has cited the long list of state cases on which he relies. But this is not the proposition on which the Surety Company relies; and the Receiver's cases, even if they support his view, do not apply.

The position of the Surety Company is that it is not a conspirator, but one conspired against. It relies neither upon want of consideration nor the promise of the faithless bank official as such, but upon the fraud practised upon it by procuring its agent to issue the bonds without authority and against its interest.

1. The Receiver, in attempting to enforce the bonds as assets of the Bank, stands in the shoes of the Bank.

a. The statute gives to the receiver of a national banking association the power to collect only the assets belonging to the bank.

Congress created the office of receiver of a national bank and defined his duties. He is appointed by the Comptroller of the Currency under the provisions of 12 U.S.C. § 191, 192 (June 30, 1876, c. 156, § 1, 19 Stat. 63; R.S. § 5234, May 15, 1916, c. 121, 39 Stat. 121). In defining his duties § 192 provides that he—

> "• • • under the direction of the comptroller, shall take possession of the books, records, and *assets* of

every description *of such association,* collect all *debts* due, and *claims belonging to it* * * *." (Italics supplied.)

Except for specific additional statutory powers, as, for example, the power to recover stock assessments (12 U.S.C. § 191), the receiver of a national bank is limited, in his collecting, to assets, debts and claims *belonging to the bank.* As the Court said in *Wallace* v. *Hood,* 89 Fed. 11, 22; 97 Fed. 983; 182 U.S. 555:

> "The receiver is the mere ministerial agent and instrument of the comptroller of the currency for winding up the affairs of the bank, with only limited powers, specified by the statute creating his office."

As this Court said in *United States* v. *Weitzel,* 246 U.S. 533, 541:

> "The appointment of a receiver does not dissolve the corporation; the assets remain its property; the receiver deals with the assets and protects them for whom it may concern, including the stockholders."

He is a "statutory assignee."

Kennedy v. *Gibson,* 8 Wall. 498.

In *Earle* v. *Commonwealth of Pennsylvania,* 178 U.S. 449, the Court said (at p. 455):

> "The scheme of the statute relating to suspended national banks is that from the time of a bank's suspension all its assets, of whatever kind, *as they are at the time of suspension,* pass in the first instance, to the receiver, the proceeds thereof to be distributed by the Comptroller among those whose claims are proved to

his satisfaction or are adjudicated by some court of competent jurisdiction."

See also *Folsom* v. *Smith,* 113 Me. 83, where the Court said (p. 92):

> "No special authority [under the statute] is expressly given a receiver to preserve or enforce the rights of creditors, as separate and distinct from the rights of the corporation * * *.
>
> "But the current of authority favors the proposition that a statutory receiver succeeds only to the rights of the defendant in the receivership suit, and is subject to all the equities that could have been successfully involved against the latter, unless the statute otherwise provides * * *."

b. The receiver of a national bank takes the assets of the bank subject to all equities.

In the leading case of *Scott* v. *Armstrong,* 146 U.S. 499, 507, the Court held:

> "The receiver took the assets of the Fidelity (National) Bank as a mere trustee for creditors, and not for value and without notice, and, *in the absence of statute to the contrary, subject to all claims and defenses* that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached." (Italics supplied.)

In *Fourth St. National Bank* v. *Yardley,* 165 U.S. 634, 653, the Court said:

> "The receiver took no greater rights in the property of the insolvent bank which came into his possession than that which the insolvent bank possessed."

In *Rankin, Receiver* v. *City National Bank,* 208 U.S. 541, 546, the Court said, by Mr. Justice Holmes:

> "If the Guthrie [National] Bank had sued while it was a going concern, it could not have recovered, and *the receiver stands no better than the bank.*" (Italics supplied.)

2. The decisions under which recovery of assets of the bank has been allowed to a receiver when the bank itself might not have been allowed to recover have no application in the cases at bar.

The cases cited by the Receiver (Petitioner's Brief, pp. 24-26) for the proposition that a receiver of a national bank is not in all cases subject to defenses which would have been good against the bank are all cases in which the Court has kept the receiver within his statutory powers.

In the first, *Texas & Pacific Railway Co.* v. *Pottorff, Receiver,* 291 U.S. 245, 260, the Court held that "The bank itself could have set aside this transaction" (an *ultra vires* pledge of assets of the bank as security for a private deposit). But, added Mr. Justice Brandeis, even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge, because—

> "It is the duty of the receiver of an insolvent corporation to take steps to *set aside* transactions which fraudulently or illegally reduce the assets available for general creditors. * * *" (Italics supplied.)

The decisions in the *Pottorff* cases, and in *City of Marion* v. *Sneeden, Receiver,* 291 U.S. 262, immediately following it and also cited by the Receiver, are, it is submitted, cases in which the receiver is collecting assets of the bank. The

pledge of the securities was, in each case, void under the principles of the Statutes of Elizabeth (Acts of the 13th and 27th of Elizabeth), which, as this Court has said, were only declaratory of the common law.

Hamilton v. *Russell,* 1 Cranch, 309, 316.

As said by Shaw, C.J., in *Pratt* v. *Wheeler,* 6 Gray, 520, 522, 523:

> "The theory of the law is, that such a deed by a debtor, to defraud creditors, passes nothing; for all purposes of attachment, the estate is the property of the debtor, it is attached as his, levied upon as his, the title by force of the levy passes directly from the debtor to the execution creditor, the intermediate deed is void, and therefore the estate is not misdescribed as the estate of the debtor, though such void deed be on record."

These are different from the cases at bar, where the fraudulent transaction was not the void attempt to transfer away an existing asset of the debtor, but a void attempt on behalf of the debtor bank to acquire for it an asset which it had never owned.

The next three cases cited by the Receiver, *Scott* v. *Deweese, Receiver,* 181 U.S. 202, *Langtry* v. *Wallace, Receiver,* 182 U.S. 536, and *Oppenheimer* v. *Harriman National Bank & Trust Co.,* 301 U.S. 206, are concerned, not with the receiver's collection of assets of the bank, but with his separate statutory duty to collect stock assessments, which are, by statute, an absolute liability. In *Scott* v. *Deweese* the Court held that—

> "immediately upon the failure of the bank the rights of creditors attached under § 5151, and a shareholder who was such when the failure occurred could not es-

cape the individual liability prescribed by that section * * *."

The same decisions in the other two cases are based upon similar construction of the statute. In the *Oppenheimer* case, after the stockholder's statutory liability had been satisfied, the Court, holding that he could rescind the fraudulent sale of the stock to him as against the Conservator, said (p. 214):

> "Neither lapse of time while plaintiff remained ignorant of the fraud nor insolvency of the bank detracted from its liability."

In *McCandless* v. *Furlaud et al.*, 296 U.S. 140, the last case cited by the Receiver on this point, no national bank receiver was involved. The case is one of fiduciaries fraudulently depleting the assets of a business corporation. The principle of the Statutes of Elizabeth is applied, the majority opinion, delivered by Mr. Justice Cardozo, saying (at p. 167):

> "As we have striven to make clear, the receiver does not claim to succeed to the rights of bondholders and noteholders to recover damages for deceit. The wrong that is here redressed is the unlawful *depletion* of the assets whereby the company was made insolvent and the creditors were defrauded of their lawful remedies."

In the course of the dissenting opinion in that case, in which four Justices of this Court joined, Mr. Justice Roberts said (at p. 173):

> "Third. It is of course true that a receiver represents creditors and stockholders; but the proposition is true only in the sense that what he recovers as assets of his

> corporation is dedicated first to the payment of creditors and afterwards to the liquidation of outstanding shares. It has never been doubted that his right of action for a fraud committed upon the corporation by a third person is no greater than and no different from that available to the corporation * * *."

Even under the principle of the Statutes of Elizabeth, a fraudulent conveyance will not be set aside as against one who has taken for value and without notice of the fraud.

> *Horbach* v. *Hill,* 112 U.S. 144, 148.
> *Gottlieb* v. *Thatcher,* 151 U.S. 270, 279.

No public policy requires that an innocent person be penalized.

3. The decisions cited by the Receiver as having allowed receivers of banks to recover when the instrument has been given to make a false show of assets to deceive a bank examiner are not in point.

A careful examination of these decisions will reveal that all, at least all that support the Receiver, are based upon public policy, not upon estoppel. Some use the language of estoppel; but they are concerned, not with actual reliance by creditors, but with the intent to deceive the bank examiner. They consider it unconscionable that one guilty of wrong should set up his own wrong as a defense.

But there is no public policy against allowing an innocent person to defend himself against the fraud of another; nor is it unconscionable for him to do so. And *there is no case, state or federal, cited by the Receiver or discovered by counsel for the Surety Company, in which a receiver of a bank, state or national, has been permitted to recover*

against a party who, like the Surety Company in this case, had no knowledge of the transaction and was itself the victim of fraud.

The basic rule that one shall not be heard in a court of justice to allege his own wrong is not inconsistent with this Court's decision in the *Rankin* case. It is not a rule of estoppel. That rule is stated by an eminent writer as follows:

> "§ 426. Before concluding this Chapter, it is perhaps proper to take some notice of the rule of conduct which the judiciary has adopted for its own guidance, and in the public interest, that any party litigant shall not be allowed, either in support of his claim, or in answer to that of his opponent, to set up his own fraud, illegality or wrong—*nemo allegans suam turpitudinem est audiendus,*—a rule which is kin to, but of wider scope than, the rule, *ex turpi causa non oritur actio.* This principle is certainly not part of the doctrine of estoppel by representation: nor, indeed, in strictness can it be described as a rule of estoppel of any kind, even in the widest sense assigned to that term in jurisprudence * * *."
>
> Spencer Bower, The Law Relating to Estoppel by Representation (1923), pp. 383, 384.

The Surety Company in the cases at bar not only does not set up as a defense any fraud, illegality or wrong of its own; it is guilty of none. It is a victim of the fraud of others.

The State Court Decisions cited by the Receiver:

In many of the state cases the intent to deceive the bank examiner is not, of course, specifically alleged as a defense

to a note given for that purpose. The defense pleaded is want of consideration. Where the note was given for the accommodation of some one other than the bank, the defense of no consideration fails as against the bank. Where the note was given as an accommodation to the bank, the defense of want of consideration without more has been denied, apparently on the assumption that it is in itself an admission of a dishonest purpose to say that one gave a note to a bank which one intended not to pay. In one of the earlier and most frequently cited of the state cases, *State Bank of Moore* v. *Forsyth,* 41 Mont. 249, the Court said:

> "Notes are ordinarily given to a bank for the purpose of borrowing money therefrom. We can conceive of no circumstances under which a bank can acquire an accommodation note on its own account for any legitimate purpose. It seems to us that the mere request carries notice that the purpose for which such paper is intended is to be used is not a lawful one. What legitimate end could possibly be served by carrying in a bank commercial paper which was not to be paid under any circumstances? Obviously none. The only possible design would be to deceive some one, either the stockholders, the depositors, or the bank examiner, who acts for them in the name of the state. The trial judge should have held the defense of no consideration, unavailing under the defendant's own showing and should have given binding instructions for the plaintiff.

This language is quoted in *Bangor Trust Co.* v. *Christine,* 297 Pa. 64, 68 (which is itself cited in *Warren National Bank* v. *Jamieson,* 301 Pa. 45).

Comment on certain other specific cases may be helpful to an understanding of their views.

In *Day* v. *Farmers' & Merchants' Bank,* 229 Ala. 372, the remarks of the Court are *obiter dicta,* and refer to the "estoppel" as "consonant with the spirit of morality, common honesty and justice." Recovery by the receiver was denied because there was no averment that the note was executed for the purpose of making an appearance of assets so as to deceive the bank examiner.

In *Murphy* v. *Gumaer,* 18 Col. App. 183, the defendant said that the release of the overdrafts, which his notes were given to replace, was fictitious, and that there was no consideration. It appeared that the defendant knew the exact purpose for which the notes were used. The Court said (p. 189):

> "We do not think he is in a position to say that the books did not speak the truth."

In *Ashley* v. *Rowe,* 101 Fla. 110, the owner of bonds brought a bill to recover them from the receiver of a state bank. She set forth her agreement with the bank. In sustaining a demurrer to the bill, the Court held that she had connived in making an appearance of false assets, and said that it would be "unconscionable" for her to recover them. There was a dissenting opinion. The case was distinguished in *Mayer* v. *Eastwood Smith & Co.,* 122 Fla. 40, 45.

In *Golden* v. *Cervanka,* 278 Ill. 409, 427, actual cash once in the hands of a state bank was recovered by the receiver as "the restoration of a trust fund for the benefit of creditors." There are two dissenting opinions.

In *Niblack* v. *Farley,* 286 Ill. 536, the Court held that "It would be contrary to public policy and good morals" to permit the defendant to take advantage of a fraudulent agreement with the bank, by which, according to his own statement, he gave his note to enable the bank to deceive the bank examiner. The Court cited and distinguished *McCourt*

v. *Jacobs,* 256 Ill. App. 141, where the receiver was not allowed a recovery, the Court saying (p. 146):

> "No proof was offered tending to show that the note was given for any fraudulent purpose * * *."
>
> "There was no consideration for the note and it not appearing that the note was given for any illegal or fraudulent purpose, the judgment * * * is affirmed."

In *German-American State Bank* v. *Watson,* 99 Kan. 686, the defense was want of consideration. The Court held there was good consideration.

In *Cedar State Bank* v. *Olsen,* 116 Kan. 320, the Court held that the defendant was "estopped" to assert a secret understanding.

In *Hayes* v. *Addy,* 139 Kan. 481, the defendant pleaded accommodation and testified that he gave the note to deceive the bank examiner.

In *Bell* v. *Johnson,* 142 Kan. 360, the plaintiff sued the receiver of a state bank to recover a loan made to the bank. The Court, in sustaining a demurrer to his evidence, said (p. 366):

> "In the instant case, there was no witness save the plaintiff, and his testimony plainly showed that the purpose of removing Item 3 and putting in the money which it represented was for the purpose of deceiving the bank examiner * * *."

In *Denny, Banking Com'r,* v. *Fishter,* 238 Ky. 127, the defendant's second mortgage notes, on property which he received from the bank, were placed among the assets of the bank "as he knew would be the case." Estoppel was pleaded by the receiver. The Court held that the receiver could recover, saying (at p. 133):

> "Thus we see that, *under our statute,* the banking commissioner may maintain * * * such actions as a creditor or creditors could to collect in the assets liable for the bank's liabilities." (Italics supplied.)

In another Kentucky case, *The First National Bank of Nortonville* v. *Morton,* 146 Ky. 287, where the Court had denied recovery to a receiver of a national bank because it would there have been inequitable to hold the makers of a note given to make a show of assets, the Court (at p. 298) quoted the following language of Roscoe Pound, J., in *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 645:

> "Because the inequitable conduct of Barber shocks the conscience of a Chancellor is no reason why he should give his conscience a further shock by allowing Finkhouser and his associates to recover money to which they have no legal or equitable claim * * *."

In *New* v. *Page,* 144 Md. 606, the Court held that notes given by directors of the bank for stock of the bank were given on good consideration.

In *Prudential Trust Co.* v. *Moore,* 245 Mass. 311, directors knowingly gave notes to make good depleted assets of their bank. It was held that, because of their position, there was good consideration, and that to let them plead invalidity of the notes would be "unjust and fraudulent."

In *German-American Fin. Corp.* v. *Merchants & Mfrs. State Bank,* 177 Minn. 529, the plaintiff, suing the receiver of a state bank for return of collateral on a note given to the bank, attempted to set up a secret agreement. Recovery was denied, the Court saying (p. 536):

> "The plaintiff, after entering into such a fraudulent scheme for the purpose of circumventing the law, cannot be permitted to escape liability."

Third National Bank of St. Louis v. *Reichert,* 101 Mo. App. 242, was an action by a national bank, not its receiver. The note was given to pay for stock in a company. The defendant maker set up an agreement that it was given so that the bank could exhibit assets to the bank examiner. The bank recovered, the Court saying (at p. 253):

> "a person who engages in a fraudulent transaction will be left without relief from a hurtful consequence which may befall him * * * there was good consideration for the note."

In *State Bank of Moore* v. *Forsyth,* 41 Mont. 249 (*supra*), the Court, which had said that one who gave an accommodation note to a bank, knowing that it is to pass through the regular channels of the bank, must know that it is for an illegal purpose, adds (at p. 271):

> "It is only an innocent party who can take advantage of such a defense * * *."

In *United States National Bank* v. *Chappel,* 71 Mont. 553, it was held that the Court in the *Forsyth* case had erred in excluding parol evidence of the agreement. Here the defendant gave her note to save her son from a charge of felony. Her note was used contrary to the agreement by which it was obtained. The Court said (p. 567):

> "The defendant here, *innocent of wrong,* was giving value for inaction and silence. None of the reasons which stopped the mouth of Forsyth confronted her upon her defense." (Italics supplied.)

Harrington v. *Connor,* 51 Neb. 214, was an action on a note purchased from the receiver of a state bank. The defense was "no consideration" and that the note was given for the sole purpose of enabling the cashier to get around

an excess loan statute. In allowing recovery the Court said (p. 219):

> "The defense which it was sought to interpose on behalf of the defendants *involved the statement of a fraud.* * * *" (Italics supplied.)

In *Schmidt* v. *Haines,* 115 N.J.L. 217, the defendant had endorsed a note payable to a national bank to help a company in which he was interested. The bank discounted the note. It was held that there was good consideration. The Court said (at p. 234):

> "Defendant's contention, in its essence, is that they became parties to the paper for the accommodation of the bank solely—an expedient devised to deceive the federal bank examiners * * *. There is respectable authority for the view that an accommodation party to a note given, as contended here, to deceive the bank examiner with a false finding as to the bank's assets, is estopped from asserting such defense, especially when insolvency intervenes. This estoppel is rooted in what has been termed '*good morals and sound public policy.*' " (Italics supplied.)

In *Hurd* v. *Kelly,* 78 N.Y. 588, it appeared from the defendant's answer that he was informed, when he executed the bond, that it was to be used in reference to the relations of the bank to the banking department "so that a better showing of assets of the bank would appear." It was held that it would be a "gross injustice" to permit him to avoid his obligation.

In *Best* v. *Thiel,* 79 N.Y. 15, a mortgage was given by the defendant to make up a deficit in the assets of the bank. It was held that, "upon the clearest principles of justice and morality, the defendant should be estopped from denying the validity of the mortgage."

Bay Parkway National Bank v. *Shalom*, 270 N.Y. 172, is another case in which the bank itself was allowed to recover on a note in spite of an agreement not to enforce it. The Court said (p. 176):

> "Where one knows that his note is to be treated as an asset of the bank and, as a result, bank examiners are deceived and depositors continue their accounts with the bank on the faith of the assumed solvency, then he is estopped from pleading the defense of no consideration."

Mount Vernon Trust Co. v. *Bergoff*, 272 N.Y. 192, decided in November, 1936, is the latest of the state cases cited by the Receiver. In that case the defendant at the request of the bank delivered her note to the bank and received back a letter saying that the note was not to be enforced against her "anything in said note to the contrary notwithstanding." The Court allowed the *bank* to recover. There was no question of insolvency. The Court said (pp. 195, 196):

> "In this case no witness, produced at the trial, testified as to the reason why a note was received, and at the same time a writing was given, exempting the maker from liability. No explanation is necessary, for but one inference can be drawn from the testimony. * * * The defendant may have been ignorant of what the bank was trying to conceal. *We are not told in this case whether the bank examiner was deceived, and indeed we do not know whether anyone was deceived.* A fictitious note delivered to a bank, intended to become part of its apparent assets, though not intended to be enforceable, is in itself a continuing falsehood calculated to deceive the public, and any person delivering such a note becomes a party to the falsehood.

> * * * The defendant may not have intended to deceive any person, but when she executed and delivered to the plaintiff bank an instrument in the form of a note, she was chargeable with knowledge that, for the accommodation of the bank, she was aiding the bank to conceal the actual transaction. *Public policy* requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be *estopped from thereafter asserting* that simultaneously the parties agreed that the instrument should not be enforced." (Italics supplied.)

In *Vallely* v. *Devaney,* 49 N.D. 1107, notes were given to deceive the examiner. It was held (p. 1116) that the defendant was "estopped"—

> "When a note or other obligation is given to a bank with the avowed object of its appearing as assets for the purposes of public examination * * *."

In *Peterson* v. *Baird,* 63 N.D. 604, 605, the plaintiff was denied recovery where he alleged—

> "that on December 20, 1928, at the solicitation of the cashier of the bank, he assigned to the bank his interest in a contract for the sole purpose of restoring 'the cash reserve of said bank and thus avoid suspension of business' and for no other consideration."

The Court said (p. 612):

> "This estoppel arises when one silent 'when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist * * *.'"

In *State, ex rel. Lattamer,* v. *Hills,* 94 Ohio St. 171, the Court held that neither want of consideration nor failure

of consideration was a defense to a note given to meet the requirement of the State Superintendent of Banks, but added that, if the notes were given by a defendant to avert a threatened criminal prosecution against his brother if they were not given, the issue of duress was properly submitted to the jury. (*Cf.* Ragan's threats to Cliff after the first bond had been given, in order to obtain the others (R. 49).)

In *First National Bank* v. *Boxley,* 129 Okla. 159, the bank was allowed to recover, the Court saying (p. 163), that, where there was no want of consideration—

> "the maker cannot defeat its payment by showing that with his knowledge it was intended to mislead the bank examiner as to the bank's condition and securities."

Putnam v. *Chase,* 106 Ore. 440, 445, holds that, on grounds of "sound public policy," one who has executed a note for the express purpose of perpetrating a fraud shall not be heard to set up that fact as a defense.

In *State Bank of Pittsburg* v. *Kirk,* 216 Pa. 452, there was a rule absolute for judgment for want of a sufficient affidavit of defense in an action on a note. The affidavit of the defendant directors of the bank stated in part (p. 453):

> "The undersigned • • • hereby testify that the above-named notes are made up and carried by the bank in order to prevent having any past due paper • • •."

In *Lyons* v. *Benny,* 230 Pa. 117, the Court allowed the receiver to recover, saying (p. 121):

> "Neither the law nor good conscience can sanction the contention of the defendant that he ought to be permitted to take advantage of the fraudulent agreement between him and the bank • • •."

In *Arthur* v. *Brown,* 91 S.C. 316, the defendant gave his note to enable the bank to evade the law. The Court held (p. 322):

> "When he entered the plan * * * signed the note and had the bonds placed to his credit, as to the bank he was a maker for value."

Shaw v. *Borchers,* 46 S.W. (2d) 967 (Tex. Cir. App., 1932), was an action by the receiver of a state bank. The answer set up an agreement that the note would be listed as an apparent asset because of a requirement of the Commissioner of Banking, but would not become an obligation of the defendant. The Court held (p. 969):

> "Under the circumstances, fairness and justice demand that the defendant in error should be estopped from availing himself of the defense that the renewal note, which he led the banking department to believe to be a real asset of the bank, is but a mere scrap of paper."

In *West Rutland Trust Co.* v. *Houston,* 104 Vt. 204, the Court said (p. 208):

> "* * * it was an illegal transaction, and it is *against public policy to permit the defendants to rely upon such an illegality* as a defense." (Italics supplied.)

In *Webb* v. *Pleasants,* 144 Va. 516, the note was given for accommodation of the bank, as collateral for a certain note only. The note was not so recorded in the bank. It was held that the receiver could not recover. The Court said (pp. 519, 520):

> "It is of course true that as Pleasants was free from any complicity in the fraud practised by Pool, and was ignorant thereof, and as the note was a purely accom-

modation note for which Pleasants received no value whatsoever, as between the bank and Pleasants, unquestionably the bank would have no standing in court in an action against Pleasants to recover on the note.

"Under the facts in this case we do not think the receiver, suing for the benefit of the creditors of the bank, stands in any better position than the bank would stand. If Pleasants had been party to the fraud or if he had negligently done anything which kept the insolvent institution going to the detriment of depositors and creditors, the situation would have been different.

"That Pleasants had a right to give such a note to be used solely for the purpose for which this note was given, and which was void if used for any other purpose, and that such conditional delivery for such special purpose can be proven by parol, we think, is beyond question.

* * * * * * * *

"Under the circumstances of this case the receiver stood in no better position with reference to the note than the bank did."

Allen v. *Hay,* 64 Can. S.C. 76, though a Canadian case, is not announcing its own views of the law. The Court there said:

"even if our general notions as to the application of the rule of estoppel are violated in some respects we have to disregard those notions and apply the law as it is enunciated by the Washington [state] decisions."

None of the state cases appear to have discussed the statutory limits of the powers of the receiver of a national bank. Many of them use, in one form or another, the expression that "the defendant is *estopped* as against the

receiver who *represents* creditors and depositors of the insolvent bank." Few of them carry the "estoppel" beyond the initial intentional giving of the note. None of them holds liable a person who did not know that his note was to be used as an asset of the bank. None holds a maker liable without fault, because of any proved or assumed injury to specific creditors or depositors. None holds that the receiver "represents" specific creditors so as to utilize an injury to them for the benefit of all.

A careful reading of the cases cited by the Receiver will show, it is submitted, that the courts were not enforcing a right derived by the receivers of banks, whether state or national, from the creditors and depositors of those banks, but were applying a rule of disability to the makers of the notes who were guilty of fraud. They were, in effect, applying the rule of *nemo allegans suam turpitudinem est audiendus*, extended to include a prohibition against the makers' setting up the defense of accommodation to the bank where that defense is obviously an admission of participation in a misrepresentation by the bank of its assets.

This is borne out by the fact that, where occasion arose, the courts have applied the rule, not only on behalf of a receiver, but also on behalf of the bank itself. (See *Bay Parkway National Bank* v. *Shalom*, 270 N.Y. 172 (*supra*); *Mt. Vernon Trust Co.* v. *Bergoff*, 272 N.Y. 192 (*supra*); and *Warren National Bank* v. *Jamieson*, 301 Pa. 45 (*supra*).)

Some of the state courts for good measure, and some, perhaps, out of a confusion of mind arising out of the use of the word "estoppel," have mentioned actual deception of the bank examiner and continued business with depositors. Some courts in speaking of the receiver as "representing the rights of creditors" seem even to have borrowed the language of the law against fraudulent conveyances. But none of the decisions seeks to establish rights

derived through creditors and to let the receiver enforce them as such.

As has been seen, the principle of the Statute of 13 Elizabeth (2 St. at Large, p. 588) does not create an obligation which the debtor never owed. It rendered void a fraudulent conveyance and enables the receiver to treat the fraudulently conveyed property as the property of the debtor. And it does not even avoid a fraudulent conveyance against one who did not participate in the fraudulent intent.

The rule that no one will be heard to assert his own wrong, even if so extended as to prohibit his setting up accommodation to the bank, has no application to the Surety Company, which sets up no wrong and was guilty of none. Even a broad rule of public policy denying a defense to any one who participated in a deception of a bank examiner would not deny its defense to a party which, like the Surety Company, did not participate in any such deception.

The Federal Decisions:

Under the federal decisions the receiver stands in the shoes of the bank.

Rankin v. *City National Bank of Kansas City,* 208 U.S. 541; 52 L. Ed. 610.

Munroe v. *Harriman,* 85 F. (2d) 493 (C.C.A. 2, 1936).

Bosworth v. *Cady,* 72 F. (2d) 62 (C.C.A. 7, 1934).

Kaercher v. *Citizens' National Bank,* 57 F. (2d) 58 (C.C.A. 8, 1932).

Lenzing v. *Rayzor,* 41 F. (2d) 224 (C.C.A. 5, 1930).

Andresen v. *Kaercher,* 38 F. (2d) 462 (C.C.A. 8, 1930).

Hookway v. *First National Bank*, 36 F. (2d) 166 (C.C.A. 8, 1929).

Yates Center National Bank v. *Schaede*, 240 Fed. 241 (C.C.A. 8, 1915).

Skud v. *Tillinghast*, 195 Fed. 1 (C.C.A. 6, 1912).

Peterson v. *Tillinghast*, 192 Fed. 287 (C.C.A. 6, 1911).

Drake v. *Moore*, 14 F. Supp. 89 (D.C. E.D. Ill., 1936).

Varden v. *First Christian Church of Pineville, Ky.*, 13 F. Supp. 159 (D.C. E.D. Ky., 1936).

Stewart v. *Peoples-Ticonic Bank*, 12 F. Supp. 337 (D.C. Me., 1935).

Yates Center National Bank v. *Lauber*, 240 Fed. 237 (D.C. Kan., 1915).

Cutler v. *Fry*, 240 Fed. 238 (D.C. Kan., 1915).

Yates Center National Bank v. *Schaede*, 240 Fed. 240 (D.C. Kan., 1915).

The leading federal case, and the only case in which this Court appears to have expressed its opinion on the rights of the receiver of a national bank with respect to a fictitious asset which the bank itself could not recover, is *Rankin* v. *City National Bank of Kansas City*, 208 U.S. 541 (*supra*). In that case the defendant bank, which had set up a false credit on its books in favor of the insolvent national bank whose receiver brought the suit, was not called upon to set up its own fraud as a defense. It had already wiped out the credit in accordance with the secret agreement. That the Court had in mind the illegality of the transaction, and that it approved the rule *nemo allegans suam turpitudinem est audiendus*, is apparent from the statement of Mr. Justice Holmes (at p. 547):

> "In view of the statement of counsel • • • that they did not contend that the contract was illegal • • • we

shall not consider that aspect of the case. *It would not help the plaintiff. McMullen* v. *Hoffman,* 174 U.S. 639." (Italics supplied.)

For in the *McMullen* case the Court held that, in any action brought in which it is necessary to prove an illegal contract, courts will not enforce it; and that, where only part of the contract is pleaded, the other portions may be shown to have been illegal.

Had the Court felt obliged as a matter of public policy to penalize the City Bank for setting up the fictitious asset to deceive the bank examiner, it could have done so regardless of the contentions of counsel, for the City Bank participated in the fraud.

The United States Supreme Court held that the receiver could not recover the amount of the credit. In the opinion, written by Mr. Justice Holmes, the Court said (pp. 545 ff.):

"This suit, it will be remembered, is to recover an alleged deposit, and the first thing to notice is that *the whole business, from beginning to end, was, and was intended to be, a mere juggle with books and paper to deceive the examiner.*

* * * * * * * *

"As between the banks, *no one got any money; and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner.* If the City Bank should be held, it would be held without ever having received a *quid pro quo* except in the most narrowly technical sense. The consideration would be the delivery of Billingsley's note by the Guthrie Bank.

* * * * * * * *

"* * * it merely agreed to credit these sums against the notes which it held, on the express condition that no checks should be drawn against them; and that,

when the first note matured, or after the second, whenever the bank pleased, the notes should be charged against the account and extinguish it. We perceive no sufficient ground for substituting a fiction for the only promise the City Bank ever really made. If the Guthrie Bank had sued while it was a going concern, it could not have recovered, and *the receiver stands no better than the bank.*" (Italics supplied.)

The statement of facts contained in the opinion of the Supreme Court in the *Rankin* case is stated to be an abridgment of the facts more fully set forth in the opinion of the Circuit Court of Appeals, reported as *Cherry* v. *City National Bank,* 144 Fed. 587, to which express reference is made. That Court was more specific in characterizing the conduct of the City Bank:

"This method of bookkeeping no doubt served the purpose which inspired it, to deceive the comptroller or the bank examiner. The Guthrie Bank appeared to have, according to its books, at first $30,000. and later $25,000. to its general credit in the defendant [City] bank more than it really had. In this way the Guthrie Bank was able to get rid of its three obnoxious notes amounting to $30,000. apparently without disturbing its cash reserves, and in a manner satisfactory to the bank examiner. * * *" (*Cherry* v. *City National Bank,* 144 Fed. 587, 590).

"We find that the parties at *the outset agreed that the transactions in question should take the forms of loans but not their reality.* * * *" (*ibid.* pp. 590, 591).

"*The whole transaction was a subterfuge. It afforded the Guthrie Bank the spurious opportunity of making a partial and misleading entry on its own books* to the effect that it had a greater general credit in the defendant [City] bank than it really had; thereby

enabling it to take care of the excessive loans without exciting suspicion. *The correspondence shows that the defendant [City] bank became subservient to the scheme of the Guthrie Bank,* but on terms of absolute security to itself. *It* accommodated its customers, *pretended* to make a loan of money, but in reality retained possession and absolute title to the same, and by charging the face of Billingsley's notes to the special account, in the circumstances disclosed, it cannot be said to have made use of any of the money of the Guthrie Bank. The Guthrie Bank, while it was a going concern, could not have maintained an action against the defendant for conversion of the money, and neither can the receiver, who takes only the rights of the bank, now do so. But if the transaction in question evinced a real loan by the defendant bank, instead of the pretended one, as already found, we must reach the same conclusions" (*ibid.* p. 591).

"These quotations, and other features of the letters [to the City Bank] very clearly show the purpose to have the money which incidentally became available by means of the loan, the current general account and the misleading bookkeeping of the Guthrie Bank, devoted at once to the use of the Bank, and not to Billingsley's own use. The promise found in the letter of September 8th, to keep as large a general balance on hand as possible and the contemporaneous draft of $30,000. against the general account in favor of the Guthrie Bank show how the scheme was to work. The Guthrie Bank was to get out of the general account $30,000. for its manipulation in disposing of the excessive loans, and by reason of the fact that the special account, even though it could not be drawn against, was to appear in the Guthrie Bank as a part of its general balance in the defendant bank, the apparent gen-

eral balance would not be lessened thereby and the bank's reserve would apparently remain intact" (*ibid.* p. 592).

"The special finding of fact discloses that contemporaneously with the borrowing of the check for $30,000. drawn against the general account in defendant bank, the excessive loans were 'taken up or charged out of the assets of the bank'; that these notes are not now among the assets of the Guthrie Bank; that 'it does not appear what has become of them'" (*ibid.* p. 593).

"* * * *It is too clear for further argument that the notes in question were, with the full understanding of both parties,* employed by them as instrumentalities of the Guthrie Bank to do its business, and not that of Billingsley personally" (*ibid.* p. 593).

Counsel for the Receiver argued in the Circuit Court of Appeals that the reason for Mr. Justice McKenna's dissent in the *Rankin* case was his familiarity with the ruling of his own Court, the Ninth Circuit, in the case of *Pauly* v. *O'Brien,* 69 Fed. 460, which is one of the cases upon which they strongly rely here. This suggestion, if adopted, completely destroys the theory of the Master that the question of whether the receiver had greater rights than the bank was overlooked by the Supreme Court in the *Rankin* case. For if this was the reason for Mr. Justice McKenna's dissent, it follows of course that the principle declared in *Pauly* v. *O'Brien was* discussed and considered by the Court in deciding the *Rankin* case.

The four federal cases cited by the Receiver do not sustain his proposition that a receiver can recover though the bank could not:

In *Pauly* v. *O'Brien,* 69 Fed. 460 (C.C. Calif., 1895), decided thirteen years before the *Rankin* case, the Court

held that there was good consideration, the note in question having been given with the *bona fide* intention that it replace an existing bad note, and added (p. 461):

> "If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government, and to the creditors and stockholders of the bank that it had a valuable note when in fact it had none, the result must be the same, for when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself."

There is no statement that the bank could not have recovered.

In *Federal Reserve Bank* v. *Crothers,* 289 Fed. 77 (C.C.A. 4, 1923), the Court held that the note was given, not for the accommodation of the bank, but for the accommodation of its president, intending it as a real asset, and that there was, therefore, no failure of consideration. The *Rankin* case was distinguished on this ground, and on the further ground that in that case the Guthrie bank was a party to the fraud and could not recover.

In *Bohning* v. *Caldwell,* 10 F. (2d) 298 (C.C.A. 5, 1925), directors of a national bank gave their notes to cover a shortage of assets in the bank. Their interest was held to be a sufficient consideration. There is no indication that the bank itself could not have recovered.

Utley v. *Clarke et al.,* 16 F. Supp. 435 (D.C. N.Y., 1936), the plaintiff, who was suing the receiver to recover back securities lent to the bank's officers to give a false appearance of assets, had to set out his own wrong as part of his case.

None of these cases seems to be inconsistent with the *Rankin* decision.

D.

The Receiver Cannot Recover on Account of Any Rights Derived through Creditors or Depositors of the Bank and Arising Out of Damage to Them.

1. *No Rights Arising out of Damage to Creditors and Depositors was Pleaded (nor, in Fact, do the Pleadings Allege Any Deception of the Bank Examiner).*

The Circuit Court of Appeals ruled (R. 287) that there were no allegations in the declarations at law of deception of, or injury to, any creditors of the Bank.

In his petition for rehearing the Receiver urged that, though the actions at law were on the bonds, in the suits in equity—

> "the depositors were found by the Master to have suffered loss by reason of the conduct of the agent of the Surety Company, and that, therefore, such damage can upon the pleadings and the findings of the record, be the subject of decrees in favor of the receiver" (R. 290).

The Circuit Court of Appeals denied the petition on the ground that the only issues raised by the pleadings, at law or in equity, were on the bonds (R. 292).

The pleadings must fit the proof.

> "The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the Court cannot judicially act upon them as a ground for its decision; * * *."
>
> Story, J., in *Harrison et al.* v. *Nixon,* 9 Pet. 483, 503.
>
> *C., B. & Q. R.R.* v. *Babcock,* 204 U.S. 585, 592, 593.
>
> *Wall* v. *Parrott Co.,* 244 U.S. 407, 411.
>
> *Piatt* v. *Vattier,* 9 Pet. 405, 415.
>
> *Putnam* v. *Day,* 22 Wall. 60.

Pickard v. *Clancy,* 275 Mass. 89.
Duane v. *Merchants Legal Stamp Co.,* 227 Mass. 462, 468.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery—rules which have been established for ages, on the sound set and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on Courts."

Marshall, C.J., in *Crockett* v. *Lee,* 7 Wheat. 522.

"If fraud is relied on it is not sufficient to make the charge in general terms" (after trial).

St. Louis & San Francisco R. Co. v. *Johnston,* 133 U.S. 566, 577.

"If, indeed, it were true in fact that the bill does not allege this incompetency so as to put it in issue, the objection would be conclusive; for it is well settled that the decree must conform to the allegations of the parties."

Marshall, C.J., in *Harding* v. *Handy,* 11 Wheat. 103, 120.

"A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree * * *."

Boone et al. v. *Chiles et al.*, 9 Pet. 177, 207.

The facts constituting the estoppel relied upon must be pleaded if relief is to be based thereon.

Rittenhouse v. *Newhardt*, 232 Pa. 433.
Appeal of Thompson, 126 Pa. 367.
Lehigh Valley R.R. v. *McFarlan*, 30 N.J. Eq. 180.
Moran v. *Palmer*, 13 Mich. 367.
21 Corpus Juris, 674, 675, Equity, § 855.

The Surety Company insisted from the outset upon its right to confine the evidence to the pleadings (R. 90).

2. *The Receiver does Not "Represent" the Creditors in Such a Way as to Enable Him to Enforce on Behalf of All the Individual Rights of One.*

The Master recognized that under the *Rankin* decision the Receiver could not hope to stand better than the Bank with respect to any rights derived *through* the Bank. He did not, therefore, waste time on rights derived through the Bank; but proceeded to look for rights derived through creditors. This fact is apparent where he says (R. 67):

"In the course of a six-page opinion Mr. Justice Holmes adverts to the receiver's status only once by saying (p. 546): 'The receiver stands no better than the bank.' This is the only reference to any *possibility that the receiver might derive rights through creditors that he did not derive from the bank;* and it raises the

suspicion that no such contention was made." (Italics supplied.)

To supply this want left by the *Rankin* decision, the Master—mindful that the state decisions seemingly at variance with the *Rankin* decision used the word "estoppel"—sought a further "estoppel" to connect the creditors with the Surety Company; and then, by an ambiguous use of the word "represent," arrived at his conclusion:

> "4. I rule that the bonds and 'endorsements' in suit are binding obligations in the hands of the Receiver *due to the fact that he represents the Bank's creditors*" (R. 42). (Italics supplied.)

The expression that the Receiver "represents the Bank's creditors" is familiar and is frequently used in the state cases. But the Master was not using it in its familiar sense and as used in those cases. He was using it, undefined, to cover (1) representation of the creditors as the custodian of assets in which they are to share ratably, (2) representation of the individual rights of individual creditors who may be shown to have been misled, and (3) any other representation convenient to the argument.

How does the Receiver represent the Bank's creditors? The phrase, undefined, might mean anything or nothing. It reminds one of Pareto's remark in his "The Mind and Society" (vol. 1, p. 352, § 586):

> "A person interested in arguments only as regards their logico-experimental force might suppose that when people are stocking up with such postulates they would see to it that they be as exact as possible and lend themselves to strictly logical development. But experience has shown that that is not the case, nor ought the fact seem surprising to anyone mindful of

the logic of sentiments. *For purposes of persuasion postulates that may mean anything because they mean nothing exact are the best imaginable.*" (Italics supplied.)

Although the language of the Master means nothing exact, and although some courts have used similar language inexactly, if we turn to the fundamental concepts of the law, to the thing itself and not just the words, the fallacy of the ruling is apparent.

> "It is claimed that the receiver represents both creditors and stockholders, and so all objections derived from either and both of these sources are put together and urged with united force, although it may happen that one of these classes will take the entire benefit of objections which only the other class can make. Views of this sort are, perhaps, encouraged by a generality of expression, in adjudged cases, which did not, in their circumstances, call for precision and accuracy."
>
> *Curtis* v. *Leavitt*, 15 N.Y. 9, 42; quoted in *Marion Trust Co., Receiver,* v. *Blish*, 170 Ind. 686; 84 N.E. 814.

There is one generally accepted sense in which a receiver "represents" creditors. A corporation, and here a national bank, is a legal entity. It owes certain duties to its stockholders, other duties to its creditors. So long as the corporation is solvent both stockholders and creditors have interests in it represented by choses in action. In a sense the corporation may be said to "represent" these interests.

The corporation as a legal entity stands between its stockholders and creditors as such, on the one hand, and the other persons with whom it has dealings, on the other hand. Nei-

ther stockholders nor creditors, as such, are parties to its transactions. It "represents" its stockholders and creditors only in the sense that it represents itself, and that they each have an interest in it, depending upon the terms of the choses in action by virtue of which each is a stockholder or creditor.

When the corporation becomes insolvent, the interests of creditors usually predominate. That they do so may be due to the difference between the kind of contract between a corporation and its stockholders and the kind of contract between the corporation and its creditors; it may be due to the insolvency or bankruptcy law; it is usually due to both. Because those contracts and those laws (at least prior to the enactment of Section 77B of the present bankruptcy law) have generally accomplished the result of wiping out the stockholder's equity when the corporation is insolvent and is being liquidated, we have come to think of the creditors as the only ones still having interests in an insolvent corporation.

Since the purpose of the liquidation is to collect the assets, to liquidate them and to distribute them ratably among the creditors, the insolvent corporation may be thought of as belonging to its creditors. (But this does not mean that the private rights of the creditors, as such, belong to the corporation.)

If the person to whom the duty of liquidation is given be given only the power to collect, liquidate and distribute the assets of the corporation among the creditors, he may be said to "represent" the creditors, in that what he is doing is for their benefit. If he is given an additional power, and is permitted to enforce the rights of individual creditors, as contrasted with the rights of the corporation which are to be enforced for the benefit of the corporation and through it for the benefit of the creditors generally, then and in that event he may still be said to "represent" creditors; but it

will not mean the same thing. And a statement of a court that a receiver "represents the corporation's creditors" cannot be understood until we understand in what sense it was intended. It is necessary, therefore, to turn from the phrase to the facts and law underlying each case.

For the purposes of orderly discussion it is convenient to take illustrations of four of the possible ways in which a receiver might—if the law permitted—"represent" creditors of the insolvent corporation of which he is receiver. These four illustrations differ in the powers enjoyed by the receiver in each case:

(*a*) The receiver might have the power and duty to collect all assets of the debtor corporation, to liquidate them, and to distribute the proceeds ratably among the creditors. Under this illustration we will assume that he stands in the shoes of the debtor and is subject to all defenses to which the debtor would be subject. In this case the receiver would "represent" the creditors only in that what he did was for their benefit, ratably but as a class.

(*b*) The receiver might have the power and duty to collect, liquidate and distribute ratably among the creditors all assets of the debtor, including assets fraudulently conveyed by the debtor or assets which the debtor for some reason could not himself recover, but which, under the Statutes of Elizabeth and like enactments, under the insolvency or bankruptcy laws, or under analogous common-law principles, could be enforced by creditors or on their behalf. To his powers might also be added a right to collect stock assessments. In this case the receiver could be said to "represent" creditors in the additional sense of enforcing on their behalf a right common to them all.

(*c*) The receiver might conceivably be given a statutory power to enforce on behalf of a particular creditor, and solely for the benefit of that creditor, a private right which that creditor had against a third person. In that event the

proceeds of his recovery would go to that creditor, and the receiver might be said to "represent" that creditor in the sense that an attorney represents his client, or a trustee his *cestui que trust,* or an agent his principal.

(*d*) But a receiver ought not under any circumstances to be empowered to enforce on behalf of all the creditors ratably a private right of a single creditor, to such an extent that the person against whom the right was enforced would be under obligation, not merely to pay the amount of the injury to that creditor, but to pay so much to the receiver that all the other creditors, none of whom had been injured, would receive the same ratable share as the single creditor who had been injured. In such a case (and it is the case which the Receiver urges), the phrase "the receiver represents the creditors" is used ambiguously, and the ambiguity covers up a fallacy in the reasoning.

If the creditors, depositors or stockholders have rights, they alone can enforce those rights.

Audenried v. *Betteley,* 5 Allen, 382.
Branch Banking & Trust Co. v. *Pierce,* 195 N.C. 717; 143 S.E. 524.
Jacobson, Receiver, v. *Allen,* 12 Fed. 454 (N.Y 1882).
Wall v. *Howard,* 194 N.C. 310; 139 S.E. 449, 450.
Simmons v. *Taylor,* 106 Tenn. 726; 63 S.W. 1123, 1126.
Bane v. *Powell,* 192 N.C. 387; 135 S.E. 118, 119.

The case of *Branch Banking & Trust Co.* v. *Pierce* (*supra*) was an action brought by the receiver of a bank against the officers and directors to recover, for the benefit of depositors and creditors, moneys and assets alleged to have been wrongfully received, negligently diverted and recklessly

squandered by them. The defendants demurred in part on the ground that no cause of action was stated in favor of the plaintiff on account of deposits alleged to have been wrongfully received. The defendants appealed from a decree overruling their demurrers, and the Court on appeal held the demurrers valid as to the assets wrongfully received. It modified and affirmed the decrees. The Court said:

> "But under *Wall* v. *Howard,* 194 N.C. 310, 139 S.E. 449, and *Bane* v. *Powell,* 192 N.C. 387, 135 S.E. 118, the allegations with respect to the wrongful receipt of deposits would seem to be without avail and superfluous in an action by the receiver. On motion they should be stricken from the complaint. *The injured depositors alone may sue for such alleged wrongs.* To this extent the demurrers are valid upon the second ground stated above."

In *Simmons* v. *Taylor* the Court said, in part:

> "The authority vested in a receiver as a matter of law, and solely by virtue of his appointment, or under a general order such as is contained in Exhibits A and B, is not to bring any sort of a suit which he may deem best or advisable, but only such necessary and proper suits as are required to assert the rights vested in him as receiver * * *. There is another class of assets which do not vest in a receiver at all, but arise out of statutory provisions in favor of creditors of a certain kind; that is, the liability of directors assenting to the creation of debts in excess of the capital stock of the corporation. This right vests only in express creditors, and not in the corporation itself, and can be sued for only by such creditors * * *."

The case of *Audenried* v. *Betteley,* 5 Allen, 382, is precisely in point. There the plaintiff had put personal property into Hammond's hands for the purpose of enabling Hammond thereby to obtain false credit and borrow money on the strength of his possession of the property. After Hammond became insolvent it was claimed that his assignee could hold the property as against the plaintiff on the ground that the latter was estopped to set up his title against a creditor who had given credit to Hammond in reliance upon the property, and that this estoppel ran to the assignee as the representative of creditors. The Court held to the contrary, and said (Hoar, J.), pp. 387, 388):

> "Each creditor who was actually defrauded may still have his action against the plaintiffs. But this right of action, which is special and individual, is not transferred to the assignee of the debtor in insolvency; and the right to treat the property which was fraudulently represented as the property of the debtor as if it were really his property, seems to us equally the personal right of the creditor who was defrauded, and not transferable by the assignment for the benefit of creditors generally."

See also *Chesbrough et al.* v. *Woodworth,* 195 Fed. 875; aff'd 244 U.S. 72.
Michelsen v. *Penney,* 10 F. Supp. 537 (*supra*).

3. The Surety Company is Not "Estopped" Because of Any Deception of the Bank Examiner or of Any Depositor or Creditor of the Bank.

The Master based squarely on *estoppel* his contention that the Surety Company was liable to the Receiver.

> "The foreseeable reliance upon these bonds of Bank examiners and creditors would *estop* the Surety Com-

> pany to deny the representations of enforceability explicit in the terms of the instruments. The cases establish that the Receiver as representative of creditors may assert the *estoppel in pais* thus arising'' (R. 65).

After citing certain state decisions which he interpreted as asserting such an ''estoppel,'' the Master attempted to distinguish the decision of this Court in the *Rankin* case by stating that in the *Rankin* case there was no evidence that the bank examiner was deceived; that any creditor relied on the situation created; that any person became a creditor after the transaction referred to; or that creditors would not be paid in full (R. 67, 68). The Receiver follows the Master's lead.

None of these elements was any more present in the cases cited by the Receiver than in the *Rankin* case. The decisions in those cases, though they use the word ''estoppel,'' appear to be based, at best for the Receiver, upon a broad public policy, making the transaction void *ab initio* by reason of the fraudulent intent without the necessity of proof of specific injury to a specific creditor. They declare the defendant makers of notes and bonds liable in an action by the receiver, because it would be contrary to public policy that the defendant, who knew the note or creditor bond was to be held out to the bank examiner as an asset of the bank, should be heard to deny that it is such an asset.

What do the additional findings relied upon by the Receiver amount to?

a. Actual proof of deception of the bank examiner would not, in itself, give the Receiver any additional rights. (It may be assumed that the bank examiner was deceived in

the *Rankin* case, since the fraud continued from September till April. The Court assumes this when it says "the only benefit of the loan *in fact* or contemplation was a swindle upon the bank examiner.") In any event deception of a public official is not in itself a ground of estoppel to deny the facts which he was led to believe.

Hunnewell v. *Duxbury,* 154 Mass. 286.

He does not represent the Government so as, through the Comptroller, to identify himself with the examiner and assert an estoppel based upon a deception of the examiner as his alter ego.

Chesbrough et al. v. *Woodworth,* 195 Fed. 875, 880 (C.C.A. 6, 1912); 244 U.S. 72.

And see *Brown* v. *Schleier,* 194 U.S. 18.
Case v. *Terrell,* 78 U.S. 199, 201.
Scott v. *Deweese,* 181 U.S. 202, 210.

If we are dealing solely with public policy, then the moment the fraudulent paper is put among a bank's assets the wrong is complete. If, an hour after the bank examiner had been deceived, the maker of the note were to repent, the situation would hardly be different from what it was when the note was originally given for the purpose of deceiving him (see cases cited at p. 48 of the Petitioner's Brief). The change, if any, must come when, by reason of action, or inaction, by the bank examiner a creditor is foreseeably led to make a deposit in the bank in reliance upon what the examiner had done in reliance upon the note. The bank examiner is, therefore, but a link in the chain of causation of injury or threatened injury to a creditor whom the receiver "represents." Bearing this causation in mind, we can turn to the case of the creditor.

b. Reliance by individual creditors cannot equitably be made the basis of an estoppel as to all.

In considering the effect of reliance upon the bonds by a specific creditor, let us assume a case in which the maker of a note, M, himself knew that it was to be shown by the bank to a prospective creditor, C; that it was so shown to C; that C, in reliance upon the belief that it was an asset of the bank, deposited or lent the bank a large sum of money; that the bank became insolvent and C lost his money. Assuming that the bank could not enforce the note against M, and assuming the decisions to be such that the receiver could not otherwise recover where the bank could not, would the facts (1) that M knew that the note was to be shown to C, and (2) that C relied on the note to his damage, give the receiver a right to enforce the note against M?

The Receiver claims that they would, because the Receiver "represents" creditors.

In the illustration we have taken we will assume, to avoid confusion, that no other creditor of the bank was misled or injured. The receiver represents all the creditors, to collect and distribute the assets of the bank ratably. Does he, in addition, represent C specifically? And if so, how?

According to the Master's ruling and the supporting argument, there is an *estoppel in pais* which "the Receiver as the representative of the creditors may assert." As representative of which creditors? The nine hundred and ninety-nine who were not injured, or the one who was?

To illustrate the necessity of this distinction, let us assume certain figures: Suppose that the total claims of creditors amount to $1,000,000; that C's claim amounts to $1000, or 1/1000 of the whole; and that M's note had a face value of $20,000. But for M's deception C would have saved his $1000, because the bank would have been closed. Assuming a 50% dividend from other assets, C has lost $500 through M's act. Conversely, M has done a wrong which

caused a $500 injury. If the receiver recovers the full $20,000 on the note, C's share will be, not $500, but 1/1000 x $20,000, or $20; M will be paying $20,000 for a $500 tort; and the other nine hundred and ninety-nine creditors will be getting $19,980 of assets to which they would not otherwise be entitled. If the receiver "represented" C, in the sense of being C's agent to collect the $500 lost by C, then he would have just the right that C would have, namely, a right of action in tort. But the receiver has no right to act for C alone. He must treat all creditors alike and distribute assets ratably.

White v. *Knox,* 111 U.S. 784; 28 L.Ed. 603.

The receiver may not "represent" the creditors in some undefined way which would let him use C's injury on behalf of all, at not only M's expense, but also at C's. Those courts which have troubled to analyze the effects of such a "representation" of creditors by a receiver have held that this cannot be done.

> "The essential question in the cases arises upon the reply, wherein the receiver, in a sense at least, shifts his ground, and attempts to fortify his original cause of action by seeking to bring forward the rights of a certain class of creditors. If the receiver were by law authorized to, and could, consistently with his duty to the general creditors, represent this limited body of creditors, it might possibly be said that he was not bound to anticipate the defense of fraud when he filed his complaint, and that therefore the reply did not involve a departure (see *United States* v. *Morris,* Fed. Cas. No. 15,816), but if it be that in filing such reply he attempts to invoke the equities of persons whose rights he in nowise represents, it is clear that the reply does not state facts in avoidance of the answer.

"* * * There can be no doubt of the proposition that it is the general rule that in the ordinary receivership, which is extended over the affairs of an insolvent corporation, the receiver can only sue in the right of the corporation, and that he is subject to all of the equities which would have been available against it. This rule is subject to the exception that the receiver so far represents the general creditors that he may *avoid* transactions in fraud of their rights."

Marion Trust Co., Receiver, v. *Blish* (Supreme Ct. of Indiana, 1908), 170 Ind. 686, 690, 691; 84 N.E. 814.

"A cause of action exists there, if at all, in favor of a *class* of creditors rather than of all the general creditors. A Receiver as trustee for creditors, may prosecute only those causes of which all the general creditors are beneficiaries. * * *"

Welliver, Receiver, v. *Coate et al.,* 65 Ind. App. 195 (1917).

"The rule has been laid down that a receiver cannot maintain an action in which the granting of the relief sought would place a creditor having an equity in a worse condition, and a creditor having no equity in a better condition, than they occupied before the receiver's appointment."

53 Corpus Juris, 325, Receivers, § 537.
Davis v. *Roach,* 83 Ind. App. 320; 145 N.E. 498.
Marion Trust Co., Receiver, v. *Blish,* 170 Ind. 686; 84 N.E. 814; 29 H.L.R. 58 (and New York and other cases cited in *Marion Trust* case).

If the Receiver is "representing" C as a creditor, in the sense that he is C's agent to enforce C's rights against M,

his right of action is not on the note, which runs to the bank. If he represents C in the same way in which he represents all the creditors, his right of action is on the note; but there is no estoppel involved.

The receiver, as such, cannot enforce an estoppel to which the obligee on whose behalf he brings suit was not a party. The bank was not party to any circumstances creating an estoppel. Nor were creditors generally.

> "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."
>
> *Ketchum* v. *Duncan*, 96 U.S. 659.
> *Campbell* v. *Nichols*, 33 N.J.L. 81.

The receiver cannot act alone for the individual creditor who alone has suffered injury.

> *Lincoln* v. *Fitch*, 42 Que. 456.

c. No individual creditor would have any right of estoppel. To return to the case supposed above, the right of the deceived creditor, C, against the maker of the note, M, would be a right of action in tort for deceit. It would be a right based, not upon the theory that the note was good, but upon the theory that it was bad (like Clark's case against the Bank, R. 70). C would have no right based upon an estoppel, because C was not a party to the note.

A stranger to a bond cannot invoke an estoppel arising therefrom.

> *Eldred* v. *Bell Tel. Co.*, 119 U.S. 513, 522.
> *Herold* v. *Jefferson*, 134 So. 104 (La. 1927).
> And see *Thompson* v. *First Natl. Bk. of Toledo*, 111 U.S. 529.

Inasmuch as C was not a party to the note, or a privy, he could not sue on the note itself, and could not enforce an estoppel in regard to it.

> "An estoppel does not create a cause of action, and plaintiff must first show that it has a right to bring this suit."
>
> *City of Pittsburgh, to Use of Bessemer Cement Corp.*, v. *Commercial Casualty Co.*, 161 Atl. 630 (Pa. 1932).
>
> *Dickerson* v. *Colgrove*, 100 U.S. 578.

The right of action of C against M would be by an action of tort, and there would be no estoppel involved with respect to the instrument to which C was not a party.

> *Linsky* v. *Exchange Trust Co.*, 260 Mass. 15, 18.

d. No creditor or depositor did rely upon these bonds to his injury.

The only creditor of the Bank as to whom specific evidence of reliance and injury was offered was Clark. Clark never saw the bonds. He heard of them, if at all, only through his son, who never saw them. Neither Clark nor his son ever knew that the name of the Standard Surety Company was on the bonds as surety. Ragan, who knew the bonds were invalid, who was an intervening fraudulent agent, and who was talking to people to whom even Cliff had not been told he would show or represent the bonds (R. 45, 47), was Forrester Clark's, and only through him if at all, Clark's source of information that these loans were secured by "surety bonds." Beyond that Clark never heard of the bonds. On the strength of this finding the Master concludes "that Clark indirectly relied upon • • • the bonds" (R. 56).

The other bases for the findings that Clark relied upon the bonds were the Comptroller's attitude toward the Bank and a published statement of the Bank. The Comptroller, the Master finds, relied directly upon the examiner's having seen the Surety Company bonds; and "Clark therefore indirectly relied upon the existence of the * * * bonds" (R. 57). As to the Bank statement, the Master finds that, though Clark relied upon it (and it made no mention of the bonds), there was no sufficient evidence to enable him to find whether or not the statement would have been different if it had been known that the loans, which the bonds purported to secure, were in fact unsecured (R. 57).

Aside from Clark, there is no evidence that any single depositor relied upon the bonds. The only evidence relied upon by the Master is that $300,000 out of the $3,000,000 owed came in after the bank examination of September, 1931 (R. 59). This adds nothing beyond what was to be fairly presumed upon the facts of the *Rankin* case. The Master is not justified in stretching the facts to fit his legal theory. His admission that he did so (R. 60) does not correct the deficiencies of proof. (The evidence appears in Exhibit H of the Report, R. 100 ff.)

If any of the new depositors was in fact deceived through fault of the Surety Company, it has not been shown; and the Receiver could not be permitted to recover, on the strength of a presumed injury, ten times the amount that would go to the injured depositors; or over twenty times, if we take the revised figures evolved in Exhibit H of the Report (R. 104, 105).

e. The Surety Company is not estopped by the power of attorney or other indicia of authority to assert, even as to any creditors who might have relied on the power, that the bonds were fraudulently obtained.

See *Deputron* v. *Young,* 134 U.S. 241, 257.

The only act of the Surety Company was to give Cliff the power of attorney. This might estop the Surety Company from denying his authority as to any one who, in good faith, entered into a transaction directly with him in reliance upon the power. That is as far as the cases go which are cited at pages 61 and 62 of the Petitioner's brief. Even if the bonds had been executed at its home office, the Surety Company could set up the fraud by which they were obtained. The power of attorney was no representation that the bonds were not obtained through fraud by the Bank.

The Bank alone entered into the transaction of the bonds; and the Bank did not receive them in good faith. The rights of creditors on the bonds themselves is merely derivative and subject to defenses available against the Bank.

2 Williston on Contracts, §§ 394, 402.

They could not sue on the bonds.

Willard v. *Wood,* 135 U.S. 309.
Saunders v. *Filley,* 12 Pick. 554.

Creditors who did not rely on the bonds can have no rights of estoppel.

Thompson v. *First Nat. Bank of Toledo,* 111 U.S. 529, 537.

Creditors and depositors who, after the execution of the bonds, relied upon them (without becoming purchasers thereof for value and without notice) must depend upon a

deception of themselves after the original transaction. And such deception can give them no right to have the bonds enforced as such by the receiver of the Bank.

Lincoln v. *Fitch*, 42 Que. 456 (*supra*), at pp. 468, 469.

Baker v. *Davie*, 211 Mass. 429, 440.

The only power Cliff received from his principal was to execute and deliver instruments in its behalf. He had no authority under the power of attorney to conspire with Ragan to deceive the bank examiner or creditors of the Bank. If he did so he was acting outside his authority and the Surety Company is not bound by his acts except to some one who has been injured by his acts, of whose injury some intent or negligence of the Surety Company was the proximate cause.

If the bonds were not in fact binding between the Surety Company and the Bank, their appearance can be no ground of an estoppel.

Bissell v. *Spring Valley*, 110 U.S. 162, 169, 170.

The Surety Company had no intent to deceive any one. Cliff's knowledge of Ragan's fraud is not imputable to it (see above, I, B, pp. 30, 31).

The Surety Company was not negligent in doing the only acts it did. The Master found (R. 54) that—

> "The Surety Company was not negligent in employing him (Cliff) or in furnishing him with the power of attorney, stationery and seal."

This is not a case like the Telegraph Company cases cited by the Master, or *Gleason* v. *Seaboard Air Line*, 278 U.S. 349, where the Surety Company owes a specific duty to the bank examiner or to prospective creditors or deposi-

tors of the Bank. The power of attorney was intended for use with persons entering into transactions with Cliff as agent for the Surety Company. It forms no basis for an estoppel as to creditors of the Bank.

Bower, Estoppel by Misrepresentation, § 232, p. 201.

National Savings Bank of D.C. v. *Ward,* 21 Wall. 138.

LeLieve v. *Gould,* L.R. [1893] 1 Q.B. 491.

Supreme Lodge of Knights v. *Johanna Benes,* 135 Ill. App. 314.

Bigelow on Estoppel (6th ed.), pp. 617, 708.

It was not a reasonable probability that Cliff would use the power to deceive a bank examiner. It could not have been so used except by the intervening fraudulent act of Ragan, the president of the Bank.

O'Herron v. *Gray,* 168 Mass. 573, 577.

This may be as good a place as any to advance another argument: While the Bank was a going concern, it, rather than the examiner, was the representative of the creditors' interests. The Master has not found when the Bank became insolvent, or that any creditor relied upon the published statements of condition (R. 58). He has not found that it was kept open because of these bonds (R. 59). (See *McDonald* v. *Chemical Nat. Bank,* 174 U.S. 610.) All that is shown is that it was insolvent when closed.

Mechanics Universal Joint Co. v. *Culhane,* 299 U.S. 51.

If, as is not shown, the Bank was insolvent, or would have appeared insolvent but for these bonds, when the bank examiner saw them, and if at that time the examiner was

acting for creditors, anything that put him upon notice with respect to the validity of the bonds must, if they rely upon him as their representative, have put them on notice. That he was put on notice seems apparent. The bonds themselves must have been most unusual. It is common knowledge that a surety company does not write guaranty bonds without full collateral; and if the obligors to the Bank had had full collateral, they would have given it to the Bank and saved the premiums on the bonds. Next, as the Master found (R. 55):

> "A careful textual examination of the Westchester bond would have raised at least a doubt as to whether it secured the $40,000 Westchester note."

In the somewhat analogous case of *Loring* v. *Brodie*, 134 Mass. 453, 467, the Court said:

> "Notice of the existence of an instrument of trust affects the party purchasing trust property with full notice of its contents, whether he chooses to examine it or not. This is conceded. He should be thus affected, not only by what appears upon the face of such instrument in terms, but by the information given by it, if such information, when made the subject of fair and reasonable examination, would show the conduct of the trustee to be such as it did not permit."

The failure of the Bank to demand payment and give notice on default were apparent. That the examiner was put upon inquiry is apparent from the fact that he made inquiry—of Cliff (R. 55). But not only were Cliff's statements as to his authority in writing the bonds outside his authority and the power of attorney; they would not even have been received as evidence of his authority in a court of law. (Corpus Juris Secundum, 276, Agency, § 322).

And there could be no ratification of his acts without full knowledge by the Surety Company. (*Combs* v. *Scott,* 12 Allen, 493, 495; *Kidder* v. *Greenman,* 283 Mass. 601, 615; and see *Angle* v. *Northwestern Ins. Co.,* 92 U.S. 330, 338, 340). Why the examiner did not make his inquiry of the home office of the Surety Company may be surmised from the fact that he had already allowed himself to be so lenient to Ragan that, when the Bank was finally closed, it had only $170,000 with which to pay $3,000,000 of liabilities, and an adverse answer to his inquiry would have been most unwelcome.

But even assuming that the creditors relied in good faith upon the power of attorney, and that they suffered injury in reliance thereon (which has not been shown), no estoppel can arise out of anything except a negligence shown to have been the proximate cause of such reliance and injury.

Western Union Tel. Co. v. *Schriver,* 141 Fed. 538.

Estoppel comes from an intention to deceive, and is enforced on grounds of negligence only where the negligence is such that the party to be estopped knew, or ought to have known, that it would be acted upon by the person or class of persons asserting the estoppel.

Stiff v. *Ashton,* 155 Mass. 130, 133.

In this case the only persons whom the Surety Company ought to have known would rely upon the power of attorney were persons who should contract with Cliff.

Liability for negligence growing out of a contract, where the negligence is not so gross as to amount to fraud, "is bounded by the contract, and is to be enforced between the parties by whom the contract is made."

Cardozo, J., in *Ultramares Corp.* v. *Touche,* 255 N.Y. 170, 189.

"But the law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate."

Tracy v. *Lincoln,* 145 Mass. 357, 360.
Huntress v. *Hanley,* 195 Mass. 236, 241.
Boston & Albany R.R. v. *Reardon,* 226 Mass. 286, 291.
Gejurgis v. *Brockton Standard Shoe Co.,* 197 N.E. 51, 53.

"Appellant also contends that the corporation should be held liable under the rule that where one of two innocent parties must suffer he who clothed the wrong doer with power to cause the injury must suffer for the loss. Appellant both misinterprets this rule and attempts to apply it in a kind of action where it is wholly inapplicable. This principle cannot be construed and applied literally * * *. The rule can be invoked only with the qualification that the words 'enabling a person to cause the loss' must be understood to mean by some act, conduct or default *in the very transaction in question.*" (Italics supplied.)

Fifth St. Bldg. & Loan Ass'n v. *Kornfeld et al.,* 315 Pa. 406 (1934).

Even if the Surety Company had been negligent in permitting Cliff to have powers of attorney which might be annexed to these bonds, it would not be liable for an injury arising out of some reliance thereon subsequent to the transaction itself, for which its negligence was not the proximate cause.

Briggs v. *Spaulding,* 141 U.S. 132, 162, 163.
Scollans v. *Rollins,* 173 Mass. 275, 281.
O'Herron v. *Gray,* 168 Mass. 573, 577.

In *Swan* v. *No. British Australian Co.*, 2 H. & C. 181 (1863), the plaintiff had delivered to a broker ten forms of transfer in blank of the stock of a company. The broker filled two of the forms with the name of another company in which the plaintiff had stock and sold the shares to bona-fide purchasers. It was held that the transfers were void, and that the plaintiff was not estopped to insist that the shares had not passed under the transfer. In the course of the opinion the Court said:

> "* * * *the neglect must be in the transaction itself,* and be the proximate cause of the leading the party into that mistake; and also, I think, that it must be the neglect of some duty that is owing to the person led into that belief * * * and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.
>
> "It is an essential element of estoppel by conduct that the party asserting it should have relied upon the representations or admissions of the adverse party; and, if he relies upon negligence as the basis of estoppel, he must show that negligence was the proximate cause of the deceit." (Italics supplied.)

National Savings Bank of D.C. v. *Ward*, 21 Wall. 135.

Bank of Ireland v. *Trustees of Evans Charities*, 5 House of Lords Cases, 389; 2 T.R. 80 (1855).

Gajanich v. *Gregory*, 3 Pac. (2d) 389 (Cal. 1931).

21 Corpus Juris, 1129.

The doctrine of the Telegraph Company cases, even where the company has been negligent, does not apply so as to create liability to a person to whom it was not contemplated by the defendant that the message would be shown. In

Western Union Tel. Co. v. *Schriver,* 141 Fed. 538 (C.C.A. 8, 1905), the telegraph operator communicated the following message without authority of the sender:

> "To Commercial Bank,
> "Britt, Iowa.
>
> "We will honor Barnes draft for eighty nine hundred seventy two dollars.
>
> "BANK OF DENISON."

One of the plaintiffs saw this message, and in reliance upon it delivered cattle to Barnes. Neither the check which he took from Barnes nor the purchase price of the cattle was ever paid. The Court held that the telegraph company was not liable.

The Court said (at p. 549):

> "One who makes a representation owes no duty of care to tell the truth to those to whom he does not communicate it, to whom he does not anticipate that it will be communicated, and to whom a person of ordinary prudence in his situation would not have anticipated that it would be conveyed * * *. The presumption was that it was intended for and would be permitted to affect the addressee only. The plaintiffs were not mentioned in it, and it contained nothing from which a person of reasonable prudence could have anticipated that it would be communicated to them. When, therefore, the Telegraph Company delivered to the Bank of Britt, it made no representation to the plaintiff, it intended to make none, and it could not have anticipated that any would be made. A person of ordinary prudence and intelligence in its situation would not have anticipated that this telegram would be conveyed to them."

Wiser v. *Lawler,* 189 U.S. 260, 270, 271.

Supreme Lodge v. *Johanna Benes,* 135 Ill. App. 314.
Peck v. *Gurney,* L.R. 6 H.L. 377 (1873).
LeLièvе v. *Gould,* L.R. [1893] 1 Q.B. 491.
Bigelow on Estoppel (6th ed.), p. 708.

"As forcibly suggested by counsel for the defendant in error, if any creditor has been defrauded by misrepresentation of the real capital of the company he has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders who have taken no part in it."

Scoville v. *Thayer,* 105 U.S. 143, 151.

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story, Eq. 391.

To the same purport is the language of the adjudged cases."

Brant v. *Virginia Coal & Iron Co.*, 93 U.S. 326; 23 L.Ed. 927, 929.

4. *Estoppel Cannot be Used to Create a Liability without Fault.*

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais* * * *. This remedy is always so applied as to promote the ends of justice. *It is available only for protection, and cannot be used as a weapon of assault.*"

Dickerson v. *Colgrove*, 100 U.S. 578, 584.
Hartford Realization Co. v. *Travelers Ins. Co.*, 117 Conn. 218 (1933).
Gordon v. *Continental Casualty Co.*, 319 Pa. 555.
II Herman, Law of Estoppel, p. 925, § 798.

"106. The dangerous vagueness and seductive generality of a maxim which fixes with responsibility the mere 'facilitation,' or 'enabling of,' or the mere giving 'opportunity,' 'occasion,' or 'scope' for, a wrongful act, seems to have escaped notice for a time. It gradually, however, began to dawn on the most pronounced and vehement champions of the formula that it is much too wide to merit unqualified acceptation; for, in its plain and primary meaning, it would throw the entire loss arising from the wrongful act of the third person upon one who has been guilty of nothing but unbusinesslike conduct, and deprive him of his legal rights for no other reason than that he has carelessly conducted his own affairs."

Bower, Estoppel, § 6, The "Facilitation" Theory, pp. 89, 90, 91, 92.

(For a discussion of *Young* v. *Grote*, 4 Bing. 253 (1827), see 31 Harvard Law Review, pp. 779 ff.; and Gray, C.J., in *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, 199-203.)

> "But the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument • • •."
>
> *LeLievre* v. *Gould*, L.R. [1893] 1 Q.B. 491 (*supra*), at p. 502.

These bonds were obtained through fraud upon the Surety Company, and it is entitled to have them delivered up and cancelled.

> *Oppenheimer* v. *Harriman National Bank*, 301 U.S. 206.
>
> *Rankin, Receiver*, v. *Emigh*, 218 U.S. 27.
>
> *Williams* v. *United States*, 138 U.S. 514, 517.

II.

The Receiver has Already Elected to Proceed to Judgment and Recovery in Another Action on the Claim that These Bonds were "Fraudulent and Uncollectible," and is Bound by That Election.

It is apparent (R. 81-88) that, whatever other claims the Receiver may have had against the Fidelity & Deposit Company of Maryland, and whatever other bases of claim he may have had against it in regard to the Westchester, Stone, Robinson and Cronin matters, he asserted claims against the Fidelity & Deposit Company based upon the invalidity and uncollectibility of the four fraudulent bonds on which he is here seeking recovery. He asserted to the Fidelity & Deposit Company in his letter of April 28, 1932, and under oath in his proof of claim of June 2, 1932, that those bonds were fraudulent and uncollectible. He brought his action in the District Court against the Fidelity & Deposit Company on that claim. He allowed that action to go to judgment in his favor in the amount of $100,000, without having withdrawn that claim. The agreement of compromise, drafted during the pendency of these suits, though ingeniously worded, provided for a full discharge of the Fidelity & Deposit Company on the Receiver's claim based on the invalidity and uncollectibility of these bonds. Having obtained his $100,000 judgment with the aid of that claim, he now seeks to recover from the Surety Company on the contrary assertion that the bonds are valid and collectible.

This, we submit, he cannot be allowed to do.

A.

A Man who has Followed One Contention Through to Judgment in His Favor Cannot Thereafter Recover in Another Proceeding Based upon a Contrary Contention.

"A remedy based on the theory of the affirmance of a contract or other transaction is inconsistent with a remedy arising out of the same facts and based on the theory of the disaffirmance, or rescission so that the election of either is an abandonment of the other."

20 Corpus Juris, Election of Remedies, § 10, p. 14.

"A man cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

Honyman, J., *Smith* v. *Baker* (1887), 19 Q.B.D. 347.

"If [the party electing] has done—whether he intended it or not—an unequivocal act, i.e., an act which would be justifiable if he had elected one way, and would not have been justifiable if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

Lord Blackburn, *Scarf* v. *Jardine* (1882), 7 App. Cas. 345.

"A man shall not be permitted to blow hot and cold with reference to the same transaction, or to insist at different times on the truth of each of two conflicting allegations, according to the promptings of his private interests."

Kaehler v. *Dobberpuhl*, 60 Wis. 256.

The doctrine is well established in our courts.

United States v. *Oregon Lumber Co.*, 260 U.S. 290; 67 L. Ed. 261.
Robb v. *Vos*, 155 U.S. 13, 43.
Minneapolis National Bank v. *Liberty National Bank*, 72 F. (2d) 434, 436.
Frisch v. *Wells*, 200 Mass. 429.
Washburn v. *Great Western Ins. Co.*, 114 Mass. 175.
Counihan v. *Thompson*, 111 Mass. 270, 272.
Barnes v. *Peck*, 283 Mass. 618, 623.
Sexton v. *Prendergast*, 277 Mass. 118.
Terry et al. v. *Munger*, 121 N.Y. 161.

B.

The Receiver is No Less Bound because the Action in which he has Gone to Judgment was against the Fidelity & Deposit Company and Not against the Surety Company.

"When a party has ground to bring separate actions *against different persons*, and the maintenance of one necessitates the allegation of a fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and cannot proceed against the other."

20 Corpus Juris, Election of Remedies, § 12, p. 17.
In re Weissner, 116 Fed. 68.
Scarf v. *Jardine*, *supra* (1882), 7 App. Cas. 345.
Rewits & DeBuke v. *Uhlenhopp*, 149 Iowa, 284; 128 N.W. 400.
Hand v. *Brown*, 144 Ga. 272; 86 S.E. 1080.
Frisch v. *Wells*, *supra*, 200 Mass. 429, 430.

C.

It Makes No Difference that the Action against the Fidelity & Deposit Company was Brought After the Actions against the Surety Company.

The Receiver's proof of claim against the Fidelity & Deposit Company was filed before any action was brought against the Surety Company. This claim he pressed to judgment, with knowledge of the facts.

> "Where the defendant permits the subsequent action to be prosecuted to judgment it will operate as a bar to further prosecution of the first suit."
>
> 20 Corpus Juris, Election of Remedies, § 25, p. 35.
>
> *Scarf* v. *Jardine, supra* (1882), 7 App. Cas. 345.
>
> *Saco Brick Co.* v. *J. P. Eustis Mfg. Co.*, 207 Mass. 312, 316.

D.

The Fact that the Judgment in the Receiver's Action against the Fidelity & Deposit Company was Entered by Agreement does Not Relieve him of the Consequences of that Judgment.

If the Receiver had placed no reliance whatever on his claims that the fraudulent bonds here in question were uncollectible, he might have formally withdrawn those claims before the entry of the judgment. The facts that these bonds were specifically mentioned in the collateral agreement, that the Receiver's claims based upon them were included in the release, and that the Receiver had that agreement and release impounded are sufficient indication that this was not due to an oversight. The truth is apparent: That he continued to rely upon these claims until he had obtained his judgment against the Fidelity & Deposit Com-

pany. Having done so, and having got his $100,000, he cannot now claim that that general judgment does not cover these claims.

> "The compromise and settlement of a suit constitutes such an election as will preclude plaintiff from thereafter prosecuting an action based upon a theory inconsistent with that on which the former action was maintained."
>
> 20 Corpus Juris, Election of Remedies, § 16, p. 21.
>
> *McClellan* v. *McClellan,* 135 Ga. 95; 68 S.E. 1025.

The judgment in the Receiver's action against the Fidelity & Deposit Company, though entered by consent, was a satisfaction of all the claims made by the Receiver in that case.

> "For it was not necessary to show specifically for what items the jury returned their verdict, or whether they allowed anything on account of the cause of action which is declared or in the present action, because without any such particular proof the payment would be held to be conclusive upon the parties in relation to all matters which were in issue between them upon the trial."
>
> *Sargent* v. *Fitzpatrick,* 4 Gray, 511, 513, 514.

> "If that judgment had been founded on a verdict of a jury or a finding of a judge, there could be no question that it would be a bar to the present action on the doctrine of *res judicata.* On reason that doctrine is equally applicable to a judgment such as here was shown entered by consent in an action at law. It was for a substantial sum. It was an adjudication and settled finally the rights of the parties to that cause of action."
>
> *Biggio* v. *Magee,* 272 Mass. 185, 187.

E.

The Receiver having Gone to Judgment in his Action against the Fidelity & Deposit Company, it is Not Necessary for the Surety Company to Show that his Claims against the Fidelity & Deposit Company, Based on the Fraudulent Bonds, were in Fact Legally Enforceable against the Fidelity & Deposit Company.

In no cases found has the party setting up such a bar as here pleaded been required to try the former case. There are cases in which the plaintiff, having failed to recover in another action, has been held not to be barred. But these are cases in which he has mistaken his first remedy. Where he has gone to judgment in his favor in the other action, he is bound.

Even where the Court has held that a compromise settlement out of court was not a bar, the Court has said that a judgment would be conclusive.

> "Beyond question, if, assuming the action were tried, the plaintiff had been so ill-advised as to take a verdict and judgment upon the count of money had and received, that would have been a conclusive election on his part to waive the tort, and he could not thereafter have maintained this action against the present defendant."
>
> *Rice* v. *Reed,* [1900] 1 Q.B. 54, 62.

And where the plaintiff with knowledge of the defenses in one action has pressed that action to judgment, even though it be a judgment against him, he cannot thereafter prosecute an inconsistent remedy.

> *United States* v. *Oregon Lumber Co.,* 260 U.S. 290, 297; 67 L. Ed. 261, 269.

This is not a case in which the enforcement of the bar will deprive the party barred from all recovery on either of his

inconsistent claims; he has had one recovery. It is not a case in which the bar would operate merely as a defense protecting a party who has been guilty of wrong-doing. The Surety Company has been guilty of no wrong-doing. Nor is it a case where the defense is merely technical: The Receiver has come into court once relying upon a proof of claim, under oath, that these bonds were fraudulent, invalid and uncollectible. He has maintained that contention in the District Court as a basis of recovery. He has maintained it although he knew that the Surety Company was a re-insurer on the bonds on which he was seeking recovery by that claim, and would presumably be required to pay its share of any amount recovered by him on the basis of that claim. He has maintained it up to judgment on that claim. He has used it for what it would bring against the Fidelity & Deposit Company. And he has obtained a judgment of $100,000, which has been satisfied. He then came into the same Court, and, in effect, said to the Court: "Now that I've got that $100,000, I want to change my position and claim that these bonds are valid and enforceable, so that I can get some more money from the Standard Surety Company, even though they may have paid part of the previous judgment which I obtained on my claim to the contrary." If the action against the Fidelity & Deposit Company had been tried with the cases at bar, the Court would have required the Receiver to elect—or would have held that he had already elected by his proof of claim. And, quite aside from any possibility of double recovery from the Surety Company, the Court would have refused there, and should refuse here, to let a party recover both on the claim that the bonds were uncollectible and on the contrary claim that they were collectible. Such conduct is unconscionable.

III.

Any Right of Recovery on the Bonds which Might have Existed was Lost Through Failure to Give Notice of Default.

A.

The Right of Recovery on the Bonds was Conditioned on Notice of Default in Accordance with Their Terms.

All of the bonds contain the provision that in the event of non-payment by the principal of the debt purported to be secured, the Bank "shall notify the Home Office of the Surety Company * * * within 10 days by registered mail, of such default."

The Master has ruled (R. 73):

> "9. I rule that the giving of notice of default within ten days was not a condition precedent to recovery under any of these bonds and that, there being no evidence of damage to the Company from such delay as may have existed, the Company has no defense based upon the requirement of notice."

It is submitted that such notice is a condition.

> "If the words purport to be those of a party who is not to do the act they are interpreted, unless a contrary intention has been manifested, as limiting the promise of that party by making performance of the act a condition."

Restatement of the Law of Contracts, § 260.
Fitchburg Savings Bank v. *Mass. Bonding &c. Co.*, 274 Mass. 135.
McCord v. *Masonic Casualty Co.*, 201 Mass. 473.
McCarthy v. *Rendle*, 230 Mass. 35.
Eastern R.R. v. *Relief Ins. Co.*, 98 Mass. 420.

Smith v. *Haverhill Mutual Fire Ins. Co.*, 1 Allen, 297.

Suzuki et al. v. *National Surety Co.*, 290 Fed. 942 (C.C.A. 2, 1923).

The Master attempts to distinguish the cases cited above from the case at bar by stating that "common forms of insurance policies have been held to make notice a condition precedent to the bringing of an action; but the language of such policies differs substantially from that of the instruments here in suit." Four of the above cases are actions upon policies of insurance. But the case of *Fitchburg Savings Bank* v. *Massachusetts Bonding &c. Co.*, 274 Mass. 135, is an action on a "blanket" indemnity bond. The instrument declared upon in each case provided for notice in case of loss, and the Massachusetts Court has uniformly held that failure to comply with this provision constitutes a breach of condition and bars recovery.

The Master goes on to say (R. 75):

> "The instruments in those cases [the five cases above cited] seem to me distinguishable from those in the case at bar in their uniform insistence upon satisfaction of the requirement of notice as a prerequisite to the bringing of suit."

But an examination of those authorities discloses that in most of the cases *the instrument itself* does not require a satisfaction of the requirement of notice as a prerequisite to the bringing of suit; rather, the denial of recovery is based upon the Court's ruling, as a matter of law, upon the facts in each case, that failure to give the notice constitutes a breach of condition.

The Master cited numerous authorities in support of his contention that the requirement of notice is merely

promissory unless it is expressly made a condition or ground of forfeiture. All of the cases thus cited, with the exception of the case of *New Amsterdam Casualty Co.* v. *United States Shipping Board,* 16 F. (2d) 847 (C.C.A. 4), appear to be actions upon standard policies of insurance of different states. In the *New Amsterdam Casualty Co.* case, although the Court held that failure to give the notice required by the particular bond in that suit did not constitute a breach of condition, there appears the following statement:

> "We have carefully considered the authorities relied on by defendant * * *. They told that *failure to give notice of default in accordance with the terms of a condition contained in a fidelity or indemnity bond releases the surety from further liability thereunder. There can be no doubt that such is the law.* In these cases notice of default was provided as a condition of liability doubtless because the liability of the surety was contingent upon the bad faith or breach of contract of the principal, which would be exclusively within the knowledge of the obligee, and, if there was to be a claim of liability, the surety desired prompt notice so that it might investigate the circumstances upon which the liability was to depend."

It is submitted that the bonds in suit, if they were contracts at all, would be contracts made in Massachusetts, and that the law of the Commonwealth prevails upon all questions of construction.

In the case of *Community Bldg. Co.* v. *Maryland Casualty Co.,* 8 F. (2d) 678 (certiorari denied, 270 U.S. 652), which was an action upon a contractor's bond, originally brought in the state court and removed to the federal court upon the question of diversity of citizenship, one of the questions before the Court concerned the liability of the casualty com-

pany where the insured failed to give notice of a breach of condition of the bond. The Court said:

> "In determining the rights of litigants arising out of a contract of suretyship such as this, made and to be performed in the State of Washington, a federal court should follow the rule established by the highest court of that State."

See also in this connection—

> *Lubriko* v. *Wyman*, 290 Fed. 12.
> *Sturtevant Co.* v. *Fidelity &c. Co.*, 285 Fed. 367.
> *Burgess* v. *Seligman*, 107 U.S. 20; 27 L. Ed. 359.

> "A guaranty is to be construed strictly, and the defendant is entitled to rely upon its precise terms; to charge him with liability thereon the plaintiffs must prove that its conditions have been fully complied with."

> *Davis* v. *Wells*, 254 Mass. 118, 125.
> See *Warren* v. *Lyons*, 152 Mass. 310, 312.

The notice had to be given to the *Home Office;* notice to an agent would not be sufficient.

> "Notice to a person, particularly notice to a person at a specified place, is not given until it reaches the person named at the place specified."

> *McCord* v. *Masonic Casualty Co.*, 201 Mass. 473, 475.

Nothing that Cliff did, or could do, would deprive the Surety Company of the right to insist upon the performance of this condition. An agent had no right to waive the requirement of notice. No authority short of the Home Office,

which was entitled to receive the notice, could waive it. A waiver from an agent would be no more effective than notice to an agent.

Walsh v. *Hartford Fire Ins. Co.*, 73 N.Y. 5.

And nothing said or done by the Home Office without knowledge of its rights would constitute a waiver.

Boston Elevated Ry. v. *Maryland Casualty Co.*, 232 Mass. 246, 252.

Even if a note was "renewed," and the bond covered the renewal, the surety company was entitled to notice of non-payment of the first note on its due date. The requirement of notice of default is for the protection of the surety company. Having a bond which covers renewals, the bank is relieved of any necessity to inquire into the circumstances of the maker when he comes to renew it. But the purpose of notice of default is to put the guarantor in the same position which the bank would have been in without the guaranty, and to give the guarantor the right to exercise his own judgment in considering whether or not payment of the note should be insisted upon when it comes due or should be postponed to a later date.

Lascelles v. *Clark*, 204 Mass. 362, 373.

Upon receiving notice of non-payment the surety company might well prefer to pay the note itself, taking over the obligation of the maker, who was then able to pay, rather than take the risk of having the note extended for another period at the end of which the maker might not be able to pay.

Chace v. *Brooks*, 5 Cush. 43, 50, 51.

This is an important right, which is secured by the condition that the obligee shall give notice of non-payment. The

condition applies to each maturity date, however many times the original note may be renewed. Failure to give the notice deprives the surety company of the protection to which it is entitled, and prevents the obligee from recovering.

Shepard & Morse Lumber Co. v. *Eldridge,* 171 Mass. 516, 533.

The Master's ruling was based in part on his assumption that the Surety Company suffered no damage through delay in giving notice. But Cronin's first note matured on September 22, 1930 (R. 76). Obviously a notice to the Home Office of the Surety Company at that time would have prevented the writing of all three of the subsequent Westchester, Stone and Robinson bonds, given by Cliff under dates of December 20, 1930, June 2, 1931, and July 8, 1931, respectively. In like manner notice of each default would have prevented bonds being written subsequently. In the case of the Cronin "renewals" "sometimes there was an interval between the maturity of the old note and the making of the new, the longest such interval being sixty-three days" (R. 78). Want of notice of such defaults would have damaged the Surety Company if it were to be held liable on the bonds.

B.

The Bank did Not Give Notice as Required on the Cronin Bond.

This bond was dated September 6, 1930. The condition was that Cronin should pay *within six months from September 6, 1930,* his note for $20,000 due September 22, 1930, "or any extension thereof." On default of such payment the Bank was to notify the Home Office within ten days. No notice was given until November 4, 1932 (R. 76-78).

The original Cronin note matured September 22, 1930. Even the six months mentioned in the bond expired on March 6, 1931. Not having paid the note on September 22, he was in default. Even on the Master's interpretation of the bond, he was in default by March 6. Of default the Surety Company was entitled to notice at its Home Office within ten days. It did not receive such notice. Not having received it by March 16, the Surety Company was clearly discharged from liability. At that time neither the Stone nor the Robinson bond had been given.

Three "endorsements" were signed by Cliff. The first was dated March 21, 1931 (fifteen days after default), the second May 21, 1931, and the third November 2, 1931.

These "endorsements" cannot have the effect of waivers. The failure to give notice could not be waived except through the Home Office, which was entitled to the notice. Attempted waiver by an agent, even in express terms, without full knowledge of the Home Office, would not bind the Company.

The requirement that the Home Office was to be notified was equivalent to a provision that no other notice would suffice. A waiver of the required notice, therefore, must come from the same source. A waiver is the voluntary relinquishment of a known right. It must be shown that the Company at its Home Office knew that it had a right, before it can be found to have waived it.

> *Boston Elevated Ry.* v. *Maryland Casualty Co.*, 232 Mass. 246, 252.
>
> *Schwartz* v. *American Surety Co.*, 231 Mass. 490, 494.
>
> *National Constr. Co.* v. *Travelers Ins. Co.*, 176 Mass. 121, 123.

And no act or conduct of any agent, without such knowledge, would waive the company's rights.

Moreover—still ignoring any question of fraud in writing the bond originally—even if Cliff had authority to waive notice and if the endorsements can be construed as waivers, if he executed them in complicity with Ragan for the independent fraudulent purpose of concealing the default from his principal, his knowledge of the default could not be imputed to the Surety Company, which could disaffirm his act as soon as it became known.

Innerarity v. *Merchants National Bank,* 139 Mass. 332, 333.
Allen v. *South Boston R.R.,* 150 Mass. 200, 206.

Even if we disregard the condition in the bond for payment *within six months from September 6, 1930,* and even if the requirement had been to give notice of default of payment of any note, there were many defaults on the Cronin notes, of which no notice was given (R. 78).

Even conceding the "endorsements" to be everything that can possibly be claimed for them as extensions, the Surety Company was entitled to notice of each one of the defaults. It makes no difference whether the new notes were renewals or not, or whether as matter of law or fact notes given from one to sixty-three days after a prior note had not been paid can be said to be renewals. The terms of the bond cannot be ignored, and failure to give the required notice after each one of the many defaults discharged the Surety Company.

The Master ruled (R. 77, 78), that the "endorsements" extended the time of default to November 3, 1932, and that the time within which notice was required to be given did not expire until five days from that date, irrespective of when the notes which the bond purported to secure became due and went into default. This ruling was wrong. Even if the endorsements were new contracts, as the Master ruled, they are not complete in themselves, but must incor-

porate the terms of the bond as originally written. The endorsement did no more than extend the time limit of the bond from March 6, 1931, to November 3, 1932, and shorten the time of notice from ten to five days. But the "default of the principal" referred to was default in payment of his note to the Bank, just as it was in the bond. Granted that the bond covered renewals of the original note, as the Master rules, yet if the original note had not been renewed, notice of the default to pay it must have been given within ten days after such default. The Bank could not wait from September 22, 1930, to March 16, 1931, without giving notice to the Surety Company that the note had not been paid. This would not be fair to the Surety Company and would not give it the protection which was clearly intended, namely, to have prompt notice of the default of the principal's obligation, which was, of course, to pay his notes on their due dates.

If a note was renewed, then the obligation of the principal was thereby postponed, and within the limit of time prescribed in the bond the obligation of the Surety Company continued, and there would be no default of which it was entitled to notice, until the renewal note became due and was not paid. But when a renewal was not made on the due date, and the maker of the note had not by a renewal postponed his obligation to the Bank, he was in default of his obligation and the Surety Company was entitled to notice. His failure to pay his note when it became due, or to prevent a default by getting it extended, was clearly the "default on the part of the principal" referred to in the bond.

Cronin's so-called renewal notes were often given after the default. The last note became due on January 4, 1932. He defaulted payment on that date. No notice of his default was given until November 4, 1932. This failure to give notice discharged the bond (R. 79).

It is submitted that the construction placed upon the notice requirement by the Master cannot fairly be given to the words of the bond.

C.

The Bank did Not Give Notice as Required on the Westchester Bond.

This bond was dated December 20, 1930. The bond does not purport to secure the payment of the $40,000 note of the Westchester Company, but is conditioned on the payment *upon their due dates* of four other notes, each for $10,000 due, respectively, on January 20, February 20, March 20 and April 20, 1931. In default of the payment of *any* of these notes, the Home Office of the Surety Company was to be notified within ten days.

There is no definite evidence in the case to show what these four notes were or what has become of them. They may never have existed; they may have been paid; they may have been cancelled; they may have been surrendered; or they may have been renewed. Without clear evidence to show what the notes were, or that they in fact existed, and what became of them, the plaintiff cannot recover on this bond. The evidence fully warranted the Master's ruling that there was no liability on the Westchester bond. The "(4) notes signed by Legion Parkway Realty Corp. val. $40,000" are described as collateral in the $40,000 Westchester note itself. The pencil memorandum of dates on the note, however, do not correspond with the dates of the notes referred to in the bond.

But whatever the notes were, and even if they have not been paid, no sufficient notice of default of their payment has ever been given. The notice given December 31, 1931, did not refer to the four notes described in the bond, but to the default of the Westchester Company "to pay *their*

obligation bonded by your Company." This is not sufficiently accurate.

Torrey v. *Adams*, 254 Mass. 22, 25, 26.

Moreover, the notice was not in time. The first "endorsement" on this bond was dated April 20, 1931. The second was dated June 20, 1931. Clearly these endoresements, if effective at all, would only extend the bond as to any liability the Surety Company was under at the time when the endorsements were made. They could not revive obligations from which the Surety Company had already been discharged. On April 20, 1931, the failure of the Bank to notify the Home Office of the non-payment of the three notes, whatever they were, falling due before that date, had by then relieved the Surety Company of all liability upon them. The only liability which then could have been left was the note maturing on that day. The endorsement of April 20, if it had any effect, did not alter the condition of the bond, and as to the note falling due on April 20, the Bank was still required to give notice of non-payment within ten days. The condition of the bond was that the Westchester Company should pay the notes listed *on their due dates*, and that the Bank should notify the Home Office of default of payment of any note. The Surety Company had a right to know whether this note, as well as any other, had been paid on its due date, even if the "endorsement" obligated the Surety Company for two months longer. The bond itself stipulated that the Surety Company should pay within thirty days after April 20, 1931. Even if the endorsement extended this thirty days to December 30, there was no change in the obligation of the Bank to give notice of the default of payment of any note upon its due date.

Furthermore, neither of the "endorsements" will support an action, for the reason that they were given without consideration. They are not waivers; they are, if anything,

new contracts. They modified the bond in the important respects of term, amount and notice. The suit is brought upon them, and not on the original bond, which is only evidence to supply the terms of the endorsements.

Epstein v. *Northwestern Nat'l Ins. Co.*, 267 Mass. 571, 574.
Mill Dam Foundery v. *Hovey*, 21 Pick. 417, 429.
Blasdell v. *Souther*, 6 Gray, 149, 151.

They were all made after the notes referred to in the bond had been given, and therefore required a new and independent consideration.

Stone v. *White*, 8 Gray, 589, 593.
Mecorney v. *Stanley*, 8 Cush. 85, 87.
Tenney v. *Prince*, 4 Pick. 385, 387.
B. & R. Brewing Co. v. *Motycka*, 163 Ill. App. 238, 240.

The endorsements are not under seal, and the consideration imported by the seal on the bond does not support them. They are not within the classes of cases stated in *Torrey* v. *Adams*, 254 Mass. 22, 26, and the recognized limits of these cases is not to be extended.

Parrot v. *Mexican Central Ry.*, 207 Mass. 184, 185.

D.

Notice on the Stone and Robinson Bonds was Not Given as Required.

The Stone Bond:

This bond purported to secure the payment by Stone of his obligation to the Bank of $52,000 *within one year from June 2, 1931.* Stone had owed the Bank this amount for

some time before that date. In event of Stone's failure to pay his indebtedness within the year, notice was required to be given to the Home Office of the Surety Company within ten days. There were no endorsements on this bond.

No notice was sent to the Home Office of the Surety Company until *June 30, 1932.* This was too late by eighteen days (R. 80), and there can be no recovery.

The Robinson Bond:

The condition here was that the maker should pay his note *within four months* from July 8, 1931, "or any extension thereof." The words "or any extension thereof" do not prolong the four months within which the note must be paid. Whether the note was extended or not, non-payment on or before November 8 was a default of the condition of the bond, notice of which must be given to the Surety Company. The requirement of notice of default is absolute. Whatever may be the meaning of the obscure words which follow in the bond, the default, of which notice must be given within ten days, is non-payment within four months. Whether, if such notice had been given, the bond would continue in force is immaterial. The Master finds the bond ambiguous and therefore disregards "four months from date hereof" as repugnant. To us the words "or any extension thereof" are just as repugnant.

The letter of November 12 was not notice of a default. It merely asked the Surety Company's assent to another arrangement of the note. (In this connection note the inconsistency between the letter, which asks consent to a course proposed by the Bank on November 12, and the books of the Bank, which showed that a new note for $19,000 was taken on the same day (R. 81). The Bank could not have relied on any reply from the Surety Company even had the letter been sent.)

Even if the letter could be construed as a notice of default, it was not given to the Home Office, as required by the terms of the bond. It never reached the Home Office, and was not even mailed to that address. It was diverted by Ragan, in the Bank, through no fault of the Surety Company. Responsibility for this diversion and the consequent failure to give notice must rest upon the Bank, and not upon the Surety Company. Nor was the reply of November 17, dictated by Ragan, a waiver of notice. It did not come from the Home Office. A waiver from any source other than the Home Office cannot be relied on, without showing that it was in fact authorized by the Home Office with full knowledge of the Company's rights. It could not have been relied on by the Bank, because the new note had already been accepted on November 12.

See *Boston Elevated Ry.* v. *Maryland Casualty Co.*, 232 Mass. 246, 253.

On November 8 the Robinson note was not paid, and the bond was in default. This default continued (even on the Bank's theory that a new note given after the maturity of another is a renewal) until November 12, when another note for $19,000 was given, maturing December 9, 1931. This later note was not paid. Yet no notice of either of the defaults was sent to the Surety Company until July 8, 1932. These failures to perform the conditions of the bond discharged the Surety Company.

Conclusion.

Counsel for the Surety Company respectfully contend that no enunciation of the principles which should govern cases between receivers of national banks and persons who participated in deception of a bank examiner is essential to an adjudication of the rights of the parties to these actions. The Receiver is asking the Court to enforce against an innocent surety company, itself engaged in a business charged with a public interest and subject to governmental examination and regulation, instruments fraudulently obtained and never included in *its* reported liabilities upon true reports of which the insuring public depends for *its* solvency. The Receiver is asking the Court to enforce, as valid, instruments on whose invalidity he has already based action, judgment and recovery on blanket bonds against an insurer for which this respondent is a re-insurer. The respondent has the further defense of default of notice on the bonds. As an individual litigant it asks the protection of the Court.

Respectfully submitted,

FREDERIC H. CHASE,
RAYMOND P. BALDWIN.

Frank H. Stewart,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al., Petitioners,*

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent.*

(And Six Other Actions Consolidated Therewith)

PETITION FOR REHEARING.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
Attorneys for Petitioners.

GEORGE P. BARSE,
JAMES LOUIS ROBERTSON,
TREVOR V. ROBERTS,
Attorneys for the Comptroller of the Currency, Of Counsel.

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v.

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(And Six Other Actions Consolidated Therewith)

PETITION FOR REHEARING.

Come now Frederick S. Deitrick, Receiver of the Boston-Continental National Bank, *et al.*, petitioners in the above entitled cause, and request a rehearing, or, in the alternative, a modification of the opinion by this Court in said cause rendered, and in support thereof respectfully show:

1. In the next to the last paragraph of the majority opinion it is stated:

> "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed

contracts between it and the Surety Company. *He makes no suggestion of a purpose attributable to the company to mislead creditors or others;* makes no allegations of damage except that sustained by the bank. *He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud* obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest." (Italics inserted)

On page 6 of the majority opinion it is stated:

"By stipulation the causes were joined for appeal upon a single record. The Circuit Court of Appeals affirmed the District Court and said: 'The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration'. 'It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of the claim.' 'If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety.' In respect of the Receiver's counterclaim set up in the equity suits it said: 'The plaintiff's counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested.' 'The obligations of the Surety Company based on the depositors of the bank being in-

jured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiff's counterclaim in the equity suits'."

In connection with the foregoing, petitioners submit:

(a) If the doctrine is to be adopted in this case that notice to Ragon, the president of the bank, is to be imputed to the bank, so that his notice becomes the bank's notice, would it not logically follow by that same doctrine that the notice of Cliff, as agent of the Surety Company, must likewise be imputed to his principal, the Surety Company?

Assuming this to be sound, the situation so far as the Surety Company is concerned, would seem to be the same as if the Surety Company had intentionally and purposely conspired with the president of the bank to deceive:

(1) The bank,

(2) The directors of the bank,

(3) The bank examiners and the Comptroller of the Currency.

(4) Indirectly and derivatively, the existing and future depositors of the bank.

Disregarding for the moment the questions of pleading, and looking solely to substance, may it not properly be urged that under these circumstances the Surety Company is estopped from setting up the defenses of lack of consideration, lack of authority, and fraud of its agent, as against the depositors and other creditors of the bank who must necessarily be held to have been intended to be protected by the supervisory and administrative functions required to be exercised by the Comptroller of the Currency and his bank examiners. By reason of imputation of notice to the surety may it not be said that the situation of the surety in this respect is the same as though an individual surety

or natural person, rather than the corporate surety had conspired with the president of the bank to perpetrate this fraud upon the bank examiners and the Comptroller of the Currency and indirectly and ultimately upon the depositors and other creditors of the bank? Would an individual surety or natural person under such circumstances be permitted to set up his own fraud and conspiracy to defeat the obligation thus given by him when sued upon that very obligation by the receiver of the insolvent bank?

Certainly it would seem that such an individual surety would not be permitted to prevail. Certainly also, it would seem that if an individual surety would not be permitted to prevail by setting up such defenses, a corporate surety should not be permitted to prevail where it is chargeable by law with the notice possessed by the *sole agent* (in this case, Cliff) who was acting *for it* in the transaction in question.

Attention in this connection, in the light of the foregoing, is again respectfully directed to the doctrines relating to estoppel, established by the many cases refered to on pages 35-48 of petitioners' main brief, particularly as enunciated in the case of *Iglehart* v. *Todd*, 203 Ind. 427, quoted from page 42 of petitioners' brief, wherein it is pointed out that tne banking business is one of public concern, regulated and examined by the supervisory authorities, and that the action of those who participate in a transaction by which the assets of a bank are given a favorable appearance for the purpose of examination,

> "is fraudulent as to the public, and as to the creditors and depositors, in whose behalf the regulation of banks is imposed, * * *."

The case asserts the further doctrines that:

> " 'Where one by giving accommodation notes is instrumental in clothing a bank with such an appearance of genuine assets as induces a bank examiner to regard it as sound, and to permit it to continue in busi-

> ness, and where in its published reports such person's notes figured as resources, and the public relies thereon and intrusts the bank with its money, the maker of the note is estopped, as against the creditors, to say that his notes were other than what on their face they purported to be, or that the appearance which was given to the books of the bank was not genuine. * * *."

If it be sound doctrine that the maker of an accommodation note, given to deceive the bank examiners and to create an appearance of sound assets, is estopped in an action brought by the receiver of the bank upon those very notes, surely by analogy, an estoppel would likewise rise against one who executed surety or guaranty bonds to create an appearance of soundness of notes or other assets of the bank to which they were either physically attached or otherwise identified or allocated.

(b) As to the matter of pleading:

(1) Was it necessary that the receiver should have expressly averred that he represented the depositors when that function is imposed upon him as a matter of law and when his action in the premises could only be on behalf of and as the representative of the depositors? The guaranty bonds were sued upon as assets of the receivership, and the suit, of course, was manifestly for the benefit of the depositors. The estoppel was relied upon by the receiver,—based upon the evidence,—to rebut or overcome the defense of the Surety Company to the bonds. The suit in this respect was entirely different from any individual action which a depositor might have had *in his own right*, against some officer of the bank for fraud specifically and directly practised upon him by way of misrepresentations as to the solvency of the bank upon which the depositor had relied in placing his funds in the bank. The receiver was not representing the depositors in that kind of action.

(2) Having in mind that the Surety Company filed bills in equity to set aside and cancel the guaranty bonds, attention

is directed to numbered paragraph 4 of the bill of complaint, quoted on page 4 of the majority opinion. Therein it will be observed that the Surety Company set up the fact that the bonds were executed by Cliff without consideration, and upon the understanding that they would not be binding obligations of the Surety Company and that the Surety Company would not be informed as to the existence of the bonds.

Was this not sufficient as a matter of pleading to support the evidence relating to the fact of conspiracy between Ragon and Cliff, and is it not clear that the Surety Company intended to rely upon it as a basis for cancellation of the bonds? If so would the receiver not be entitled, upon such evidence being adduced, to contend, *as a matter of law*, that assuming such facts to be true, those very facts constituted estoppel against the Surety Company? Upon such evidence being produced would the receiver, then and there at the trial table, have to first amend his pleadings before he could assert such estoppel as a matter of law? It would seem clear under settled practise, that in this situation the receiver could assert the estoppel without necessity for amendment of the pleadings. In view of the fact that the law actions and the equity actions were consolidated, certainly the pleadings in the equity actions must be considered as well as the pleadings in the law actions.

Under these circumstances it seems to be settled that estoppel in pais may be relied upon without previous averments to that effect in the pleadings. (See page 12 of petitioners' reply brief and page 70 of petitioners' main brief.)

II. On page 7 of the majority opinion the following reference is made to the case of *Rankin* v. *City National Bank*:

> "In Rankin v. City National Bank, 208 U. S. 541, 545, 546, a suit by the receiver of the Capitol National Bank of Guthrie to recover the amount of an alleged deposit where it appeared 'that the whole business, from beginning to end, was and was intended to be a mere juggle with books and papers to deceive the bank examiner,' this Court denied the receiver's claim and said: '*If the*

Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank.' We adhere to the doctrine there approved and regard it as decisive of the present cause.'' (Italics inserted.)

It is submitted that the italicized portion of the quotation was dictum, and was not necessary to the decision of the case. However, assuming that it was not dictum, it would seem that the doctrine therein stated was in principle overruled by the later cases of *Texas and Pacific Railway Co.* v. *Pottorff, Receiver,* 291 U. S., 245 and the companion case of *City of Marion* v. *Sneeden, Receiver,* 291 U. S., 262, wherein it was held that the receiver did have a better right than the bank, and could recover on behalf of the depositors, even if it be assumed that the bank itself could not recover. To the same effect, by analogous principle, is *McCandless* v. *Furlaud,* 296 U. S., 140.

It would certainly seem to be a serious impairment of the effectiveness of the administrative and supervisory functions intended by Congress to be exercised with reference to national banks for the protection not only of these banks as Federal instrumentalities, but also of the depositors and other creditors who deal with them, to hold that where deceit and fraud has been practised upon the bank examiners and the bank afterwards goes into receivership, the receiver cannot recover upon the assets in the bank which were given the appearance of soundness as the direct result of the deceit so practised, and that the reason that such recovery cannot be made is that the notice of the deception and fraud so practised is imputed to the bank and consequently that the receiver has no greater right on behalf of the creditors in that respect that the bank itself would have had. Such appears, in effect, to be the doctrine established by the above quoted paragraph from page 7 of the opinion.

III.

CONCLUSION.

Petitioners respectfully but very earnestly urge that in view of the importance of the questions involved in this case, and in view of the considerations and distinctions hereinabove discussed, an opportunity be afforded for reargument and that reconsideration be given to the facts, the pleadings and the principles involved.

Counsel have withheld until almost the last moment the filing of this petition because of hesitancy in further adding to the burden of the court by the filing of a request for reargument and the consideration of it by the court necessarily thereby involved. However, counsel believe it their duty to again present the matter because they consider the issues involved to be of substantial public importance in the administration of the national banking system.

Respectfully submitted,

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
Attorneys for Petitioners.

GEORGE P. BARSE,
JAMES LOUIS ROBERTSON,
TREVOR V. ROBERTS,
Attorneys for the Comptroller of the Currency,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, George P. Barse, of counsel for the Receiver of the Boston-Continental National Bank and as counsel for the Comptroller of the Currency under whose supervision the said insolvent national bank is being liquidated, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

GEORGE P. BARSE.

SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1937.

Frederick S. Deitrick, Receiver of the Boston-Continental Bank, et al., Petitioners, *vs.* Standard Surety & Casualty Co. of New York.	Certiorari to the United States Circuit Court of Appeals for the First Circuit

[March 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Boston-Continental National Bank, established in December 1930 through consolidation of Boston National Bank and Continental National Bank, became insolvent. December 17, 1931, a receiver appointed by the Comptroller of the Currency took charge of its affairs. Petitioner is his successor. Among the bank's effects were four "Note-Guaranty" Bonds—$40,000, $52,000, $20,000 and $20,000—alike in form, dated in August and December 1930 and June and July 1931, with certain "endorsements" showing extensions. Each purported to be executed by the maker of a described note as principal with Respondent as surety, and was conditioned to pay to the bank the amount of the note upon default, &c.

In June and September 1932 the Receiver brought separate actions at law upon three of these bonds. In each he alleged that the Company was indebted to him for the specified penalty with interest; and for this he asked judgment. The three declarations are alike in form and allegations. One, typical of all, is copied below.[1] There also is one of the Note-Guaranty Bonds,

[1] Declaration.

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States, that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Continental National Bank of Boston, now known as Boston-Continental National Bank, a written instrument or bond, copy where-

typical of all.[2] Each declaration exhibited a bond, alleged that thereby the Company bound itself to pay the bank a specified sum

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of is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Continental National Bank of Boston the sum of forty thousand dollars ($40,000) in the event that four notes of ten thousand dollars ($10,000) each signed by Westchester Discount Corporation were not paid upon the due dates as set forth in said bond, the last due date being April 20, 1931; that some time prior to April 20, 1931, said bond was extended to June 20, 1931, by a written instrument called endorsement, copy whereof is hereto annexed marked "B"; that some time prior to June 20, 1931 said bond was extended to December 20, 1931 by a written instrument called endorsement, copy whereof is hereto annexed marked "C"; that the condition of said bond as extended as aforesaid has been broken in that Westchester Discount Corporation, the principal named therein, has not paid the notes described in said bonds according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said notes; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the plaintiff on account of the default of said Westchester Discount Corporation are in excess of forty thousand dollars ($40,000).

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond with interest from December 20, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

(Signed) By his Attorneys, ————————,

————————.

[2] Copy of Bond.

No. $40,000,00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.) to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents. The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 26, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note the obligee shall notify the home office of the Surety Company at 80 John Street, New

in the event of default, which had occurred, &c., that damages had been sustained whereby the surety had become indebted "in the penal sum of said bond, with interest".

Answering, the Company denied liability and alleged that, as the bank well knew, the bond was executed without authority, had been fraudulently obtained, was invalid.

Before the three law actions were filed the Surety Company instituted four separate equitable proceedings in the Supreme Court, Suffolk County, Massachusetts, against the bank and makers of guaranteed notes. Each complaint alleged that the bank had fraudulently obtained the bond and asked that it be declared null and void. Later the Receiver became party in these causes and all were removed to the federal court. There, he filed separate answers, substantially alike, averring that the bond had been duly executed, that default had taken place and that damages amounting to the full amount of the specified penalty had been sustained. Each answer concluded—"Wherefore these defendants pray: 1. That the court determine the amount due from the plaintiff to Boston-Continental Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest. 2. For such further relief as the court finds meet and just."

Copies of one complaint[3] and answer[4] thereto, typical of all, are in the margin.

York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION, (SEAL)
By Joseph Stone, Treas.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

[3] Bill of Complaint.

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national bank association, legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Cor-

A jury was waived in the law actions and the seven causes went to an Auditor and Master with instructions to report findings of fact and conclusions of law, the former to be final. After taking

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poration and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed Marked B and made a part hereof.

Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

(Signed) By its Attorney, _____,

_____.

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

Now comes Boston Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint says as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Westchester Discount Corporation by Joseph Stone, its treasurer, and was duly executed by the plaintiff, by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C" and "D"; that if a purported release was delivered to said Cliff by Continental National Bank by

much evidence he reported with a finding of facts showing clearly that the bank obtained the bonds through the fraud of its president, Ragan, and Cliff, general agent of the Company. Among other things he said: "I rule that the bonds and 'endorsements' in suit were not binding obligations in the hands of the bank as a going concern, for the reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and 'endorsements' would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors." He further ruled that as Cliff, general agent of the Surety Company, knew the bonds would be shown to the bank directors and to any others entitled to inquire concerning the notes described therein for the purpose of deception, therefore "the bonds and 'endorsements' in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors".

The District Court heard the causes on report and exceptions. It held the bonds void and further "adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed".

Terrell M. Ragan in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C" and "D", has been broken in that Westchester Discount Corporation, the principal named in said instrument, has not paid the notes described therein according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said notes; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Westchester Discount Corporation are in excess of $40,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

(Signed) By its Attorney, ————————,

————————.

By stipulation the causes were joined for appeal upon a single record. The Circuit Court of Appeals affirmed the District Court and said: "The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration". "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of the claim." "If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety." In respect of the Receiver's counterclaim set up in the equity suits it said: "The plaintiff's counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested." "The obligations of the Surety Company based on the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiff's counterclaim in the equity suits."

We agree with the conclusion reached by the Circuit Court of Appeals. Its judgment must be affirmed.

Counsel for the Petitioner here submit—"The Receiver's position rests primarily upon the proposition that the circumstances surrounding the giving of the note-guaranty bonds by Cliff to the Bank accompanied by the supporting powers of attorney, . . . and the consequences which followed the credence given to said bonds and powers of attorney by the national bank examiners and the Comptroller, acting as the representatives of the depositors and other creditors, give rise, in a suit by the Receiver to enforce the bonds, to an estoppel which precludes the Surety Company from denying the validity of the bonds and from asserting as a defense

that its agent acted fraudulently and without authority in executing the bonds and that a fraudulent official of the Bank knew of the agent's misconduct."

An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest.

In *Rankin* v. *City National Bank*, 208 U. S. 541, 545, 546, a suit by the receiver of the Capitol National Bank of Guthrie to recover the amount of an alleged deposit where it appeared "that the whole business, from beginning to end, was and was intended to be a mere juggle with books and papers to deceive the bank examiner", this Court denied the receiver's claim and said: "If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank". We adhere to the doctrine there approved and regard it as decisive of the present cause.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1937.

Frederick S. Deitrick, Receiver of the Boston-Continental Bank, et al., Petitioners,
vs.
Standard Surety & Casualty Co. of New York.

Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 28, 1938.]

Mr. Justice Black, dissenting.

When two or more persons have jointly perpetrated a fraud with intent to injure others, justice and law combine to entitle injured parties to recover from any or all of the conspirators. Corporations can act only through agents. When, as here, two corporations, acting through authorized agents, have jointly perpetrated a fraud which was intended to—and did—injure others, a just rule of law should likewise hold both corporations jointly and severally responsible for the damages inflicted by them upon innocent parties.

In this case innocent depositors and other creditors of a now insolvent national bank suffered damages as a direct result of fraud wilfully perpetrated on them by joint action of the bank and the respondent surety corporation, acting through their agents. Because of the guilty participation of the bank president in this fraud, the opinion just read denies the receiver of the insolvent bank a recovery which would inure to the benefit of the innocent depositors. At the same time, however, the respondent surety corporation is freed from any responsibility to these innocent parties, in spite of the admitted guilty participation of its agent. That the agent of the respondent surety corporation was authorized to write the indemnity bonds used in the fraud is disclosed by the findings of the master and auditor—acting "under a stipulation that findings of fact shall be final." These findings show that:

The duly licensed agent of the surety company (respondent) conspired with the president of the bank to supply indemnity

bonds guaranteeing the payment of certain notes held by the bank, which bonds were to be placed among the assets of the bank for the purpose of deceiving Federal bank examiners, the bank's directors and all others entitled to inquire as to the soundness of the notes; the surety company's agent also personally assured the examiners that the bonds were all right; no premium was paid the surety company and the bonds were intended by the respondent's duly authorized agent and the president of the bank to be valueless and used as "window dressings" to accomplish deceptions; respondent's duly licensed agent had a power of attorney "to make, execute and deliver . . . for and on its behalf as surety, any and all bonds . . . undertakings, or anything in the nature of any of them, . . . to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the company . . . ;" a copy of the power of attorney was attached to the bonds and the examiners inspected public records and verified the authenticity of this power of attorney; these bonds were executed after the examiners had notified the bank to make good an impairment of capital and the execution of these bonds caused the comptroller to withdraw his order to make good the impairment and as a result the bank continued to remain open, assumed additional obligations, and accepted further deposits in large amounts.

Since the receiver represents the creditors as well as the bank[1] he can sue in his own name to recover assets on behalf of the bank or its creditors.[2] "It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so." *Texas and Pacific Railway* v. *Pottorff*, 291 U. S. 245, 261. There is no occasion to consider whether the bank could recover against the insurance company on the indemnity bonds. "Enough that the receiver has the requisite capacity." *McCandless* v. *Furlaud*, 296 U. S. 140, 160. In the *McCandless* case (page 171), the minority view was that "the receiver's rights could rise no higher" than the corporation's rights. The majority rejected this viewpoint (page 159), holding that where corporate officers and shareholders combined with others to despoil a corporation, recovery

[1] Case *v.* Terrel, 11 Wall. 199, 202; High, "On Receivers", 4th Ed., Sections 314, 320; In re Pleasant Hill Lbr. Co., 126 Louisiana 743, 757; Duke *v.* Stayton Co., 132 Washington 69, 77; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 221; De Stafano *v.* Almond Co., 107 N. J. Equity 156, 159; Industrial Mut. Dep. Co.'s Receiver *v.* Taylor, 118 Kentucky 851, 854; Iglehart *v.* Todd, 203 Ind. 427, 440.

[2] See, Kennedy *v.* Gibson and others, 75 U. S. 498, 506.

could be had "either by the creditors directly or in their behalf by a receiver."

The receiver does not merely represent the corporation — the bank. The object of the appointment of a receiver is to collect and protect all of the insolvent's assets in the interest of the creditors first, then for the benefit of the stockholders. It has long been recognized that even in the case of a going bank the rights of depositors and the public would be jeopardized unless given protection in addition to that afforded by the bank's officers elected by the stockholders. For that reason, among others, the government has provided a system of examination for all national banks.[3] Statutes require banks to make reports to the Comptroller of the Currency and to permit examinations by Federal bank examiners. These examinations are designed to prevent such frauds as were perpetrated in this case. This objective will be frustrated if surety companies—with complete immunity—can, through their authorized agents, conspire with bank officials to deceive and trick bank examiners. The convenient fiction that knowledge of an officer of the bank is imputed to the bank itself is not sufficient to relieve respondent surety company from the consequences of the wrong committed by its authorized agent. There is not even a fiction under which knowledge can be imputed to innocent depositors. Strange, indeed, it is if the elaborate system of precautions provided by the government to protect the interests of creditors of national banks by examination and visitation of Federal officials must be held for naught by application of the fiction that the bank —not the injured depositors—knew everything its president knew. The interests of the bank and the interests of the depositors and creditors are not always identical. That their interests are recognized as separate and distinguishable is amply shown by laws passed to protect depositors and creditors of national banks. Public solicitude for protection of depositors is exemplified by the recent passage of the law insuring public deposits.[4]

The receiver filed suits at law side to recover on the several indemnity bonds. The surety company proceeded in equity praying cancellation of the bonds. All actions were tried on evidence be-

[3] See, Easton *v.* Iowa, 188 U. S. 220, 238.
[4] 12 U. S. C. Sec. 264 *et seq.*

fore a master and auditor "under a stipulation that findings of fact shall be final." These findings set forth all of the rights of the receiver as the representative of the creditors, the stockholders and the bank.

In this case, the principles involved are of great importance. The decree below adjudged the indemnity bonds to be void and unenforceable. Since I believe the receiver was entitled under these actions to enforce the bonds and to protect the innocent victims of fraud, I would reverse the decree below.

Mr. Justice REED concurs in this opinion.